Nos. 79-1538 and 79-1596

In the Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, APPELLANT

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE SECRETARY OF THE INTERIOR

WADE H. MCCREE, JR.
Solicitor General

SANFORD SAGALKIN
Acting Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MICHAEL A. MCCORD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1538

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, APPELLANT

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.*

---

* Other plaintiffs below were A & S Coal Company; Amos Ridge Coal Co.; Bevins Mining Co., Inc.; Big Fork Coal Co.; Bill's Branch Coal Co.; Black Creek Coal Co.; Bob's Branch Coal Co.; Bossco, Inc.; Bradley Branch Coal Co.; Brushy Ridge Coal Co.; Buchanan & Sons; Burnrite Coal Co.; Cabot Coal Corp.; Cardinal Mining Ltd.; Chaparal Mining Co., Inc.; Charles D. Dale Coal Co.; Claude Yeary Coal Co.; Conley Mullins Coal Co.; Conway Coal Co.; Copeland Coal Co.; Curt's Coal Co.; Deena Coal Co.; Double D Coal Co.; Elkins-Kendrick Enterprises; Five Oaks Coal Co.; Flat Gap Mining Co.; Gale Coal Co., Inc.; Genoa Coal Co.; G & O Coal Co.; G & T Coal Co.; H.B. Rowe & Co.; H.C. Bostic Coal Co., Inc.; H.R.C. Coal Co., Inc.; Highland Enterprises; Hi Heat Coal Co.; Horn Construction Co., Inc.; Humphreys Enterprises; J.B. Coal Co.; Jil-Mar Coal Co., Inc.; Lyons Coal Co.; Laurel Creek Coal Co.; M & M Coal Co., Inc.; Mineral Developers, Inc.; Mullins Coal Co.; Mud Fork Coal Co.; Nu-Way Coal Co.; Paramount Mining Corp.; Permac, Inc.; Pilot Coal Corp.; P & R Coal Co.; Race Fork Coal Corp.; Rosebud, Inc.; Ryder Coal Co.; S & M Coal Corp.; Sherwood Mining, Inc.; Southwest Virginia Coal Corp.; St. Charles Mining Co.; Sterling Mining Co.; Trace Coal Co.; Tridale Coal Company; Turkey Branch Coal Co.; Valley Fork Coal Co.; Wise Dock Company; W.D. Martin; Charles J. Lowry; Robert W. Kelly, Jr.; A.F.

No. 79-1596

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., APPELLANTS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE SECRETARY OF THE INTERIOR

QUESTIONS PRESENTED

1. Whether Title V of the Surface Mining Control and Reclamation Act of 1977 exceeds the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution.

2. Whether Sections 515(d) and (e) of the Act, which prescribe certain performance standards for surface coal mining operations conducted on steep slopes, violate the Tenth Amendment.

3. Whether the district court properly ruled that Sections 515(d) and 522 of the Act take private property without just compensation, in violation of the Fifth Amendment.

4. Whether the district court properly enjoined the issuance of summary cessation orders under Section 521(a)(2) of the Act and the imposition of civil penalties under Section 518 on the ground that those provisions violate the Due Process Clause of the Fifth Amendment.

Kelly; the Town of Wise, Virginia; and the Commonwealth of Virginia.

The Virginia Citizens for Better Reclamation, Inc., and the Town of St. Charles, Virginia, intervened as defendants in the district court. Their appeal to this Court (No. 79-1567) is pending.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	1
Summary of argument	13
Argument:	
I. Title V of the Surface Mining Act does not exceed Congress' power under the Commerce Clause	20
II. The "steep slope" provisions of the Surface Mining Act do not violate the Tenth Amendment	28
III. Sections 515(d) and (e) and Section 522 of the Surface Mining Act do not violate the Just Compensation Clause of the Fifth Amendment	39
IV. The enforcement provisions of the Surface Mining Act authorizing the issuance of summary cessation orders and the imposition of civil penalties do not violate the Due Process Clause of the Fifth Amendment	60
Conclusion	71
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Agins v. *Tiburon*, No. 79-602 (June 10, 1980)	42
Air East, Inc. v. *National Transportation Safety Board*, 512 F.2d 1227, cert. denied, 423 U.S. 863	65
Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450	41
Anderson & Anderson Contractors, Inc. v. *Latimer*, 257 S.E.2d 878	66

Cases—Continued Page

Andrus v. *Allard*, 444 U.S. 51 54
Andrus v. *P-Burg Coal Co.*, 495 F. Supp. 82, appeal pending, No. 80-1916 (7th Cir.) 27
Arnett v. *Kennedy*, 416 U.S. 134 70
Bethlehem Steel Corp. v. *Train*, 544 F.2d 657, cert. denied, 430 U.S. 975 25
Boddie v. *Connecticut*, 401 U.S. 371 63
Bowles v. *Willingham*, 321 U.S. 503 63
Boyce Motor Lines v. *United States*, 342 U.S. 337.. 67
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 63
Chicago Board of Trade v. *Olsen*, 262 U.S. 1 47
Clark v. *Paul Gray, Inc.*, 306 U.S. 583 47
Cleveland v. *United States*, 329 U.S. 14 ..... 23, 26
Concerned Citizens of Appalachia, Inc. v. *Andrus*, 494 F. Supp. 679, appeal pending, No. 80-1448 (6th Cir.) 27, 38-39, 58
District of Columbia v. *Train*, 521 F.2d 971, vacated and remanded on other grounds *sub nom. EPA* v. *Brown*, 431 U.S. 99 25
Duke Power Co. v. *Carolina Environmental Study Group*, 438 U.S. 59 ..... 14, 33, 47 ,60
Eastport Steamship Corp. v. *United States*, 372 F.2d 1002 59
Ewing v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 ..... 63, 65, 66, 70
Fahey v. *Mallonee*, 332 U.S. 245 ..... 63, 65
FPC v. *Natural Gas Pipeline Co.*, 315 U.S. 575..... 26
Friends of the Earth v. *Carey*, 552 F.2d 25, cert. denied, 434 U.S. 902 ..... 32, 33
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 23
Goldblatt v. *Town of Hempstead*, 369 U.S. 590..16, 54, 56
Hadacheck v. *Sebastian*, 239 U.S. 394 ..... 16, 54, 56
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 23-24
Holmes Limestone Co. v. *Andrus*, Civ. No. C80-933A, appeal pending, No. 80-3666 (6th Cir.).... 39, 58
Indiana v. *Andrus*, Civ. Nos. IP 78-500-C and IP 78-501-C (S.D. Ind. June 10, 1980), appeal pending No. 80-231 ..... 27, 39, 58, 71

Cases—Continued Page

Kaiser Aetna v. *United States*, 444 U.S. 164 42
Katzenbach v. *McClung*, 379 U.S. 294 ..... 24, 47
Kleppe v. *New Mexico*, 426 U.S. 529 47
Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 60
Lawton v. *Steele*, 152 U.S. 133 63
Mackey v. *Montrym*, 443 U.S. 1 63
Miller v. *Schoene*, 276 U.S. 272 56
Moore v. *City of East Cleveland*, 431 U.S. 494 56
Mosca v. *United States*, 417 F.2d 1382 59
Mugler v. *Kansas*, 123 U.S. 623 ..... 16, 55, 56
National League of Cities v. *Usery*, 426 U.S. 833.. 14, 23, 26, 29, 30, 31, 32, 33, 38
North American Cold Storage Co. v. *City of Chicago*, 211 U.S. 306 ..... 63, 70
Oklahoma v. *Atkinson Co.*, 313 U.S. 508 38
Omnia Co. v. *United States*, 261 U.S. 502 58
Penn Central Transportation Co. v. *New York City*, 438 U.S. 104 ..... 16, 53, 54, 55
Pennsylvania v. *EPA*, 500 F.2d 246 25
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 57
Perez v. *United States*, 402 U.S. 146 23
Permanent Surface Mining Regulation Litigation, In re, 13 E.R.C. 1447 (D.D.C. July 25, 1979) 6
Permanent Surface Mining Regulation Litigation, In re, 14 E.R.C. 1083 (D.D.C. Feb. 26, 1980) 5
Permanent Surface Mining Regulation Litigation, In re, Civ. No. 79-1144 (D.D.C. May 16, 1980) 5
Permanent Surface Mining Regulation Litigation, In re, 13 E.R.C. 1586 (D.D.C. Aug. 21, 1979) 6
Permanent Surface Mining Regulation Litigation, In re, 14 E.R.C. 1813 (D.C. Cir. July 10, 1980), vacated and rehearing en banc granted (Aug. 25, 1980) 5
Phillips v. *Commissioner*, 283 U.S. 589 ..... 63, 70
Pierce Oil Corp. v. *City of Hope*, 248 U.S. 498 56
Regional Rail Reorganization Act Cases, 419 U.S. 102 60
Reinman v. *City of Little Rock*, 237 U.S. 171 56
Rescue Army v. *Municipal Court*, 331 U.S. 549 41

Cases—Continued Page

Scottish Union and National Insurance Co. v. *Bowland*, 196 U.S. 611 70
Sierra Club v. *EPA*, 540 F.2d 1114, cert. denied, 430 U.S. 959 ..... 25, 32
Sink v. *Morton*, 529 F.2d 601 ..... 65, 71
Socialist Labor Party v. *Gilligan*, 406 U.S. 583..... 41
South Terminal Corp. v. *EPA*, 504 F.2d 646 25
Springer v. *United States*, 102 U.S. 586 70-71
Star Coal Co. v. *Andrus*, Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980), appeal pending on other grounds, No. 80-49 .....27, 38, 58, 66, 71
Surface Mining Regulation Litigation, In re, 452 F. Supp. 327 3
Surface Mining Regulation Litigation, In re, 456 F. Supp. 1301, aff'd in part, reversed in part on other grounds, 627 F.2d 1346 ..... 3, 66
United Public Workers v. *Mitchell*, 330 U.S. 75..... 40
United States v. *Appalachian Power Co.*, 311 U.S. 377 24
United States v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317 25
United States v. *Bishop Processing Co.*, 287 F. Supp. 624, aff'd, 423 F.2d 469, cert. denied, 398 U.S. 904 25
United States v. *Byrd*, 609 F.2d 1204 25
United States v. *California*, 297 U.S. 175 33
United States v. *Carolene Products Co.*, 304 U.S. 144 .....15, 26, 47
United States v. *Causby*, 328 U.S. 256 53
United States v. *Darby*, 312 U.S. 100 26
United States v. *Helsley*, 615 F.2d 784 30
United States v. *Rock Royal Co-operative*, 307 U.S. 533 26
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1.. 15, 47
Yakus v. *United States*, 321 U.S. 414 ..... 63, 64

Constitution, statutes and regulations:

United States Constitution:

Article I 32, 34
Article I, Section 8 (Commerce Clause) .....*passim*

Constitution, statutes and regulations—Continued Page

Fifth Amendment ..... *passim*
Due Process Clause....7, 17, 18, 19, 61, 66, 67, 71
Just Compensation Clause 9, 41, 51, 58, 59
Tenth Amendment ..... *passim*
Fourteenth Amendment 15

Administrative Procedure Act, Section 5, 5 U.S.C. 554 18
Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, *et seq.* 65
30 U.S.C. 814 65
30 U.S.C. 814(a) 66
30 U.S.C. 814(c) 65, 66

Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 65
30 U.S.C. (Supp. I) 814 65
30 U.S.C. (Supp. I) 814(a) 66
30 U.S.C. (Supp. I) 814(d) 66
30 U.S.C. (Supp. I) 817(a) 66

Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. (Supp. I) 1201, *et seq.* 1, 2
Section 101, 30 U.S.C. (Supp. I) 1201 8
Section 101(c), 30 U.S.C. (Supp. I) 1201(c) .. 20
Section 101(g), 30 U.S.C. (Supp. I) 1201(g) .. 21
Section 101(j), 30 U.S.C. (Supp. I) 1201(j) .. 21
Section 102(a), 30 U.S.C. (Supp. I) 1202(a) .. 2
Section 201(c), 30 U.S.C. (Supp. I) 1211(c) .. 2
Sections 501-529, 30 U.S.C. (Supp. I) 1251-1279 2
Section 501, 30 U.S.C. (Supp. I) 1251 2
Section 501(a), 30 U.S.C. (Supp. I) 1251(a) .. 2
Section 501(b), 30 U.S.C. (Supp. I) 1251(b) .. 2, 5, 6
Sections 502-522, 30 U.S.C. (Supp. I) 1252-1272 8
Section 502(b), 30 U.S.C. (Supp. I) 1252(b) .. 3, 4

Constitution, statutes and regulations—Continued Page

Section 502(c), 30 U.S.C. (Supp. I) 1252(c).. 2, 3
Section 502(e), 30 U.S.C. (Supp. I) 1252(e).. 4
Section 502(e)(4), 30 U.S.C. (Supp. I) 1252 (e)(4) 4
Section 503, 30 U.S.C. (Supp. I) 1253 ..... 5, 6, 7
Section 503(b), 30 U.S.C. (Supp. I) 1253(b).. 6
Section 503(c), 30 U.S.C. (Supp. I) 1253(c).. 6
Section 504, 30 U.S.C. (Supp. I) 1254 ..... 5, 7
Section 504(a), 30 U.S.C. (Supp. I) 1254(a).. 6
Section 506(a), 30 U.S.C. (Supp. I) 1256(a).. 4
Section 515, 30 U.S.C. (Supp. I) 1265..2, 3, 35, 53, 58
Section 515(c), 30 U.S.C. (Supp. I) 1265(c).. 16, 29, 42, 52
Section 515(d), 30 U.S.C. (Supp. I) 1265(d)..*passim*
Section 515(d)(2), 30 U.S.C. (Supp. I) 1265 (d)(2) 28
Section 515(d)(4), 30 U.S.C. (Supp. I) 1265 (d)(4) 28
Section 515(e), 30 U.S.C. (Supp. I) 1265(e)..*passim*
Section 518, 30 U.S.C. (Supp. I) 1268..11, 12, 17, 18, 19, 67, 68, 69, 70, 71
Section 518(b), 30 U.S.C. (Supp. I) 1268(b).. 68
Section 518(c), 30 U.S.C. (Supp. I) 1268(c).. 68, 70, 71
Section 521, 30 U.S.C. (Supp. I) 1271 12
Section 521(a)(1), 30 U.S.C. (Supp. I) 1271 (a)(1) 11
Section 521(a)(2), 30 U.S.C. (Supp. I) 1271 (a)(2) .....*passim*
Section 521(a)(3), 30 U.S.C. (Supp. I) 1271 (a)(3) 11, 61
Section 521(a)(5), 30 U.S.C. (Supp. I) 1271 (a)(5) 61
Section 522, 30 U.S.C. (Supp. I) 1272 ....10, 15, 39, 40
Sections 522(a)-(d), 30 U.S.C. (Supp. I) 1272 (a)-(d) 40
Section 522(e), 30 U.S.C. (Supp. I) 1272(e).. 3, 10, 15, 16, 40, 42, 52, 54, 59
Section 522(e)(2), 30 U.S.C. (Supp. I) 1272 (e)(2) 10

Constitution, statutes and regulations—Continued Page

Section 522(e)(4), 30 U.S.C. (Supp. I) 1272 (e)(4) 10, 39
Section 522(e)(5), 30 U.S.C. (Supp. I) 1272 (e)(5) 10, 39
Section 523, 30 U.S.C. (Supp. I) 1273 5
Section 525, 30 U.S.C. (Supp. I) 1275 .....11, 12, 19, 68, 69, 70
Section 525(a), 30 U.S.C. (Supp. I) 1275(a).. 69
Section 525(b), 30 U.S.C. (Supp. I) 1275(b).. 61
Section 525(c), 30 U.S.C. (Supp. I) 1275(c).. 11, 61, 62
Section 526(a)(1), 30 U.S.C. (Supp. I) 1276 (a)(1) 3, 5
Section 526(a)(2), 30 U.S.C. (Supp. I) 1276 (a)(2) 61
Section 526(c), 30 U.S.C. (Supp. I) 1276(c).. 8, 61
Section 528, 30 U.S.C. (Supp. I) 1278 2
Section 701(2), 30 U.S.C. (Supp. I) 1291(2).. 28
Section 701(4), 30 U.S.C. (Supp. I) 1291(4).. 5
Section 701(8), 30 U.S.C. (Supp. I) 1291(8).. 64
Section 710, 30 U.S.C. (Supp. I) 1300 6
Section 711, 30 U.S.C. (Supp. I) 1301 52

Tucker Act, 28 U.S.C. 1491 59
30 C.F.R. 701.5 64
30 C.F.R. 723.17 ..... 19, 69
30 C.F.R. 761.3 10
43 C.F.R. 4.1100, *et seq.* 19, 68

Miscellaneous:

Bureau of Mines Survey, *Demonstrated Coal Reserve Base of the United States as of January 1, 1976* (1977) 55
123 Cong. Rec. (1977):

p. 12878 59
p. 24426 ..... 43, 44
pp. 24426-24427 45

Miscellaneous—Continued Page

Council on Environmental Quality, *Coal Surface Mining and Reclamation: An Environmental and Economic Assessment of Alternatives* (1973).... 46, 50
42 Fed. Reg. (1977):

p. 62639 3
pp. 62703-62704 ..... 19, 69

44 Fed. Reg. (1979):

p. 14902 5
p. 15319 64
p. 15320 64
p. 15324 6
p. 15342 10
p. 60969 6

45 Fed. Reg. 69977 (1980) 7
H.R. Rep. No. 94-1445, 94th Cong., 2d Sess. (1976) 64
H.R. Rep. No. 95-218, 95th Cong., 1st Sess. (1977) 21, 29, 34, 43, 46, 47, 49, 64
S. Rep. No. 93-402, 93d Cong., 1st Sess. (1973).... 43
S. Rep. No. 95-128, 95th Cong., 1st Sess. (1977).... 21, 34, 66, 70
Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. Va. L. Rev. 553 (1979) 34, 35, 36
United States Department of the Interior Federal Coal Management Program, *Final Environmental Statement* (1979) 55

OPINIONS BELOW

The main opinion and the supplementary opinion of the district court (J.S. App. 21a-75a; 4a-16a) are reported at 483 F. Supp. 425.[1] The opinion of the court of appeals at the preliminary injunction stage (J.S. App. 76a-85a) is reported at 604 F.2d 312. The opinion of the district court at the preliminary injunction stage (J.S. App. 86a-101a) is not reported.

JURISDICTION

The final order of the district court (J.S. App. 17a-20a) was entered on January 3, 1980. An amending order (J.S. App. 1a-3a) was entered on January 21, 1980. The Secretary of the Interior filed a notice of appeal to this Court on February 1, 1980 (J.S. App. 102a-104a). Plaintiffs in the district court filed a notice of appeal to this Court on February 11, 1980 (79-1596 J.S. App. 1a-2a). On October 6, 1980, the Court noted probable jurisdiction in both appeals. The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Tenth Amendments to the United States Constitution and the relevant portions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are reprinted in J.S. App. 106a-145a. The Commerce Clause in Article I, Section 8, of the Constitution is reprinted at 79-1596 Motion to Affirm 2.

STATEMENT

1. This appeal involves a pre-enforcement challenge to the constitutionality of several critical pro-

[1] Unless otherwise indicated, "J.S. App." refers to the appendix to the jurisdictional statement in No. 79-1538.

visions of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. (Supp. I) 1201 *et seq.* Congress passed the Act in order to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. (Supp. I) 1202(a).

The principal regulatory and enforcement provisions of the statute are contained in Title V, 30 U.S.C. (Supp. I) 1251-1279.[2] Section 501 of the Act, 30 U.S.C. (Supp. I) 1251, establishes a two-stage program for the regulation of surface coal mining.[3] Section 501(a) provides for an initial, or interim, regulatory phase, and Section 501(b) provides for the subsequent, permanent phase of the program.

Section 501(a) directs the Secretary of the Interior to promulgate regulations covering an initial period during which mine operators will be required to comply with only some of the environmental protection performance standards established by the Act. Section 502(c) of the statute specifies which of the performance standards listed in Section 515 must be made applicable during this interim period. See 30

---

[2] Title II of the Act creates the Office of Surface Mining Reclamation and Enforcement ("OSM") within the Department of the Interior. The Secretary of the Interior, acting through OSM, is charged with the principal responsibility for administering and implementing the Act. See 30 U.S.C. (Supp. I) 1211(c).

[3] Certain coal mining operations are exempt from the Act's requirements. They include: operations that affect two acres of land or less; operations involving the extraction of coal for personal, non-commercial use; and operations incident to a publicly financed highway project. See 30 U.S.C. (Supp. I) 1278.

U.S.C. (Supp. I) 1252(c), 1265.[4] In particular, Section 502(c) requires that Section 515(d), setting performance standards for "steep-slope" surface coal mining, must be implemented by the Secretary's interim regulations. In addition, certain other provisions of the Act become immediately effective by their own terms during the interim period. One example is Section 522(e), 30 U.S.C. (Supp. I) 1272(e), which prohibits, with various exceptions, surface coal mining on certain lands or within specified distances of certain structures or facilities. The Secretary promulgated his interim regulations on December 13, 1977 (42 Fed. Reg. 62639),[5] and they are currently

---

[4] Under Sections 502(b) and (c) of the Act, the interim standards are applicable only to surface coal mining operations in states that were themselves regulating surface mining operations when the Act became law. All states in which surface mining was conducted on private land had regulatory programs of their own when the Act was passed in 1977. Accordingly, the interim program became applicable in all relevant areas throughout the Nation.

[5] Portions of the interim regulations have been challenged in the United States District Court for the District of Columbia pursuant to Section 526(a)(1) of the Act, 30 U.S.C. (Supp. I) 1276(a)(1). *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327 (D.D.C. 1978); *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978). Some of the statutory provisions at issue in the present case were also attacked in the District of Columbia litigation, and the district court sustained the validity of those provisions. See 456 F. Supp. at 1319-1321. The court of appeals affirmed in part and reversed in part the district court's ruling on the validity of the interim regulations. *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980). The statutory provisions sustained by the district court were not challenged on appeal.

in effect in all or nearly all states, including Virginia.[6]

Section 502(e) of the Act makes the Secretary responsible for enforcing the interim performance standards. 30 U.S.C. (Supp. I) 1252(e). The federal enforcement program to be established by the Secretary for the interim period is to remain in effect in each state until the permanent regulatory program is implemented in that state. States may continue to issue permits governing surface mining operations during the interim period, but any mining operations authorized by such permits must comply with the federal interim performance standards. 30 U.S.C. (Supp. I) 1252(b). States may pursue their own regulatory and inspection program during the interim period, and they may offer assistance in the Secretary's enforcement of the interim standards. Congress encouraged such assistance by providing for financial reimbursements to states that actively assist the federal enforcement effort during the interim period. See 30 U.S.C. (Supp. I) 1252(e)(4). The Act does not require any state to enforce any of the interim regulatory standards, however, and, until the permanent phase of the program, the statute does not authorize the Secretary to cede the federal government's independent enforcement role to states that wish to conduct their own regulatory programs.

---

[6] In those states that have submitted to the Secretary proposed permanent state programs that the Secretary has subsequently approved and that have then been implemented by the states (see note 9, *infra*), the interim regulations remain in effect as to those mine operators that were operating under valid state permits during the interim program and that have submitted timely permit applications under the permanent program but have not yet received a decision from the state regulatory authority on their applications. 30 U.S.C. (Supp. I) 1256(a).

The permanent phase of the regulatory program is established by Section 501(b) of the Act, 30 U.S.C. (Supp. I) 1251(b). The statute directs the Secretary to promulgate regulations establishing a permanent regulatory program and incorporating all the performance standards set forth in the Act, including, of course, the "steep-slope" standards described in Section 515(d). The Secretary published his permanent program regulations on March 13, 1979 (44 Fed. Reg. 14902),[7] but their effectiveness in particular states must await the implementation of a permanent state program, submitted and approved in accordance with Section 503 of the Act, or a permanent federal program, adopted in accordance with Section 504. See 30 U.S.C. (Supp. I) 1253, 1254.

Section 503 of the Act provides that any state wishing to assume permanent regulatory authority over surface coal mining operations on "non-Federal lands" [8] within its borders must submit a proposed

---

[7] The validity of portions of the Secretary's permanent regulations has also been challenged in the United States District Court for the District of Columbia, pursuant to Section 526(a)(1) of the Act. The district court has issued two opinions dealing with the permanent regulations. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. Feb. 26, 1980 and May 16, 1980). The first of these opinions is reported at 14 E.R.C. 1083. Two separate appeal proceedings involving the permanent regulations are pending in the court of appeals. *In re Permanent Surface Mining Regulation Litigation*, 14 E.R.C. 1813 (D.C. Cir. July 10, 1980), vacated and rehearing en banc granted (Aug. 25, 1980); *In re Permanent Surface Mining Regulation Litigation*, appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir. Aug. 26, 1980).

[8] A regulatory program governing "Federal lands" is established separately in Section 523 of the Act, 30 U.S.C. (Supp. I) 1273. The term "Federal lands" is defined in Section 701(4), 30 U.S.C. (Supp. I) 1291(4), to mean "any land,

permanent program to the Secretary for his approval. The proposed state program must demonstrate that the state legislature has enacted laws implementing the environmental protection standards established by the federal statute and accompanying regulations and that the state has the administrative and technical ability to enforce these standards. 30 U.S.C. (Supp. I) 1253. The Secretary must approve or disapprove each such proposed program in accordance with the time schedules and procedures established by Sections 503(b) and (c).[9] In addition, the Secretary

---

including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof, except Indian lands * * *." Section 710 of the Act, 30 U.S.C. (Supp. I) 1300, governs the regulation of surface mining on "Indian lands."

[9] Initially, the proposed state programs were to have been submitted by February 3, 1979, 18 months after enactment of the federal statute. Exercising his authority under Section 504(a) of the Act, the Secretary postponed the due date until August 3, 1979. 44 Fed. Reg. 15324 (1979). Because the Secretary's March 1979 publication of his permanent regulations occurred seven months after the date set by Congress (see 30 U.S.C. (Supp. I) 1251(b)), the United States District Court for the District of Columbia further extended the deadline for submission of state programs to and including March 3, 1980. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. July 25, 1979 and Aug. 21, 1979). The district court's injunctive order and subsequent opinion are reported at 13 E.R.C. 1447 and 13 E.R.C. 1586. See also 44 Fed. Reg. 60969 (1979) (announcing conforming changes in the Secretary's regulations governing submission of state programs).

With the exception of Georgia, Alaska, and Washington, all states in which surface mining is conducted or is expected to be conducted submitted proposed state programs to the Secretary by March 3, 1980. The Secretary has now made his initial decision on each of these programs. Three pro-

is required under Section 504 of the Act, 30 U.S.C. (Supp. I) 1254, to develop and implement a federal permanent program in each state that fails to submit or enforce a satisfactory state program.

2. On October 23, 1978, the Virginia Surface Mining and Reclamation Association, Inc., 63 of the Association's member coal companies, and four individual landowners filed this suit broadly challenging the constitutionality of Title V of the Act and, in particular, those statutory provisions to be implemented during the interim phase of the regulatory program. The Commonwealth of Virginia and the Town of Wise, Virginia, intervened as plaintiffs. The Virginia Citizens for Better Reclamation, Inc., and the Town of St. Charles, Virginia, intervened as defendants in support of the Secretary's enforcement of the Act.

Plaintiffs advanced several arguments against the Act's validity. They contended: (1) that the statute is beyond the scope of the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution; (2) that the Act has a disproportionate economic effect in southwest Virginia and thereby violates the equal protection component of the Due Process Clause of the Fifth Amendment; (3) that the Act violates the Tenth Amendment because

---

grams have been approved, eight have been approved on the condition that the state agree to some modifications, ten have been approved in part and disapproved in part, and three have been disapproved, apparently because of the state legislatures' failure to enact the necessary implementing statutes. Virginia's program was approved in part and disapproved in part. See 45 Fed. Reg. 69977 (Oct. 22, 1980). Under Section 503 of the Act, a state may revise a plan that has been disapproved in whole or in part and resubmit it to the Secretary within 60 days of the Secretary's initial decision.

it usurps an "integral governmental function" traditionally reserved to and performed by the states; (4) that, by imposing certain restrictions and conditions on surface mining operations, the Act effects a taking of private property without just compensation, in violation of the Fifth Amendment; and (5) that the Act's enforcement provisions, especially those establishing a system of civil penalties and authorizing cessation orders against imminently dangerous conditions and practices, deny coal mine operators due process of law, in violation of the Fifth Amendment.

On February 14, 1979, after a hearing on plaintiffs' motion for a preliminary injunction, the district court enjoined the Secretary from taking any action to enforce Sections 502-522 of the Act pending final disposition of plaintiffs' action on the merits (J.S. App. 86a-101a). The district court and the court of appeals denied the Secretary's application for a stay pending appeal of the preliminary injunction.

On August 10, 1979, the court of appeals reversed and dissolved the district court's injunction (J.S. App. 76a-85a). The court of appeals held that the district court had applied an incorrect standard in determining whether to grant preliminary injunctive relief and had not made the necessary findings that plaintiffs were likely to succeed on the merits and that a preliminary injunction would "not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources." See 30 U.S.C. (Supp. I) 1276(c). The court of appeals further observed that the district court had "wholly ignored the Congressional findings set forth in § 101 of the Act" (J.S. App. 83a; 30 U.S.C. (Supp. I) 1201).

While the Secretary's appeal of the preliminary injunction was pending, the district court held a 13-day trial on plaintiffs' request for a permanent injunc-

tion.[10] On January 3, 1980, the court issued an order (J.S. App. 17a-20a) and opinion (*id.* at 21a-75a) declaring several critical provisions of the Act unconstitutional and permanently enjoining their enforcement. The court rejected plaintiffs' Commerce Clause and equal protection challenges to the Act (*id.* at 26a-29a, 41a-42a). The court held, however, that the Act "operates to displace the states' freedom to structure integral operations in numerous areas of traditional functions and is in contravention of the Tenth Amendment" (*id.* at 18a; see *id.* at 30a-41a). In particular, the court ruled that "[t]he portions of the act requiring steep slopes to be restored to approximate original contour are not environmentally sound and do not serve the interests of the federal government and are so burdensome on the Commonwealth of Virginia as to threaten its economy" (*id.* at 18a). The court therefore enjoined the enforcement of the steep-slope mining standards contained in Sections 515(d) and (e) of the Act, 30 U.S.C. (Supp. I) 1265(d) and (e).

The district court also held that Sections 515(d) and (e) of the Act violate the Just Compensation Clause of the Fifth Amendment. In the court's view, Section 515(d) effects an uncompensated taking of private property by requiring steep-slope coal mine operators to restore the approximate original contour of the land after the completion of mining opera-

---

[10] The court heard testimony from several state and federal officials, expert witnesses, coal mine operators, and Virginia residents regarding the feasibility and desirability of the Act's regulatory requirements, the history of surface coal mining regulation in Virginia, the effects of surface coal mining on the environment and the public health and safety, the current condition of the surface coal mining industry in Virginia, and the comparative merits of state and federal regulation of surface coal mining.

tions. The court said that this statutory obligation renders it "physically and economically impossible to mine the coal" on steep slopes (J.S. App. 45a). The court found another unconstitutional taking in Section 522 of the Act, 30 U.S.C. (Supp. I) 1272, subsection (e) of which generally prohibits surface coal mining within 100 feet of any cemetery or the "outside right-of-way line of any public road," within 300 feet of any public building, school, church, public park, or occupied dwelling, or anywhere within national parks, national forests, wildlife refuges, and registered historic sites.[11] Accordingly, the court declared Sections 522 and 515(d) and (e) unconstitutional "until such time as the federal government sees fit to obtain said land by eminent domain and payment of just compensation" (J.S. App. 19a; see *id.* at 43a-57a).

Finally, the court considered plaintiffs' due process objections to the enforcement provisions of the Act. The court ruled that, before ordering the immediate cessation of any mining practice or condition, the Secretary must either seek judicial intervention or afford mine operators an opportunity for a hearing. The court held that this requirement applies even in cases where the Secretary determines, on the basis of

---

[11] The prohibitions in Section 522(e) are subject to "valid existing rights" and do not apply to mining operations in existence on the date of the statute's enactment. See 30 C.F.R. 761.3, 44 Fed. Reg. 15342 (1979). Furthermore, several of the Section 522(e) prohibitions are subject to waiver. For example, Section 522(e)(2) specifies circumstances in which surface coal mining may be permitted in national forests; Section 522(e)(4) permits waivers or adjustments of the prohibition against surface mining within 100 feet of roadways; and Section 522(e)(5) provides that the prohibition against surface mining within 300 feet of an occupied dwelling may be waived by the dwelling's owner.

a federal inspection, that a particular practice or condition "creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." Because Section 521(a)(2) of the Act, 30 U.S.C. (Supp. I) 1271(a)(2), authorizes the issuance of cessation orders in such circumstances without a prior hearing, and because, in the court's view, the statute does not provide sufficient guidance concerning the occasions on which such orders are appropriate, the court declared the statute unconstitutional and enjoined its enforcement (J.S. App. 19a, 57a-74a). Although only Section 521(a)(2) authorizes immediate cessation orders, the court's order enjoined subsections (a)(1) and (a)(3) as well (J.S. App. 19a). The court's opinion stated that "[t]he summary issuance of cessation orders is enjoined until such time as Congress makes provisions to correct the use of subjective criteria by [federal] inspectors" (*id.* at 73a).

The court found fault with two additional aspects of the Act's enforcement procedures. Under Section 525(c) of the Act, 30 U.S.C. (Supp. I) 1275(c), mine operators subject to a cessation order may seek temporary relief from the Secretary. If the cessation order from which relief is sought has been issued under Section 521(a)(2) or (3), the Secretary must act on the application within five days of receipt. The district court ruled that this statutory five-day period is too long and that the Secretary should be required to grant or deny the operator's request within 24 hours (J.S. App. 73a). Apparently in order to effectuate this statutory revision, the court's January 3 order enjoined Section 525 in its entirety (*id.* at 19a). The court also enjoined Section 518 of the Act, 30 U.S.C. (Supp. I) 1268, the

statute's penalty provision. Although the court's order seemed to enjoin Section 518 in its entirety (J.S. App. 19a), the accompanying opinion showed that the court disapproved only the final imposition of civil penalties without an opportunity for a prior hearing (see *id.* at 67a-69a, 74a). The court apparently thought that Section 518, especially when read together with the cessation order provision in Section 521(a)(2), can result in an irrevocable assessment of penalties before any administrative review procedures are made available (*id.* at 68a-69a).

On January 21, 1980, the district court denied the Secretary's motion for a stay pending direct appeal to this Court (J.S. App. 3a). At the same time the court issued an order and opinion (*id.* at 1a-3a, 4a-16a) clarifying its January 3 decision. The court modified its earlier order in two respects. First, the court declared that its injunction against enforcement of the steep-slope mining standards contained in Section 515(d) was not intended to "allow[] spoil to be placed on the downslope in an uncontrolled manner." The court stated that "[a]ny such downslope spoil placement shall be in a controlled manner meeting environmental protection standards specified by the regulatory authority" (*id.* at 2a). Second, the court announced that the declaratory and injunctive relief awarded against Sections 518, 521, and 525 of the Act applies "*only* insofar as those sections relate to summary issuance of cessation orders and civil penalties" (J.S. App. 2a-3a; emphasis in original).

The Secretary applied to this Court for a stay of the district court's judgment pending appeal (No. A-720). On February 25, 1980, the Chief Justice granted a stay pending further order of the Court, and on March 17, 1980, the Court extended the stay

"pending the timely filing and disposition" of the Secretary's appeal (J.S. App. 105a).

On October 6, 1980, the Court noted probable jurisdiction in the Secretary's appeal (No. 79-1538) and in the cross-appeal filed by plaintiffs (No. 79-1596). The Court consolidated the two appeals and set them for hearing in tandem with *Andrus* v. *Indiana*, No. 80-231, which involves similar challenges to the constitutionality of the Surface Mining Act.

SUMMARY OF ARGUMENT

I

Title V of the Surface Mining Act does not exceed Congress' power under the Commerce Clause. After a comprehensive legislative investigation, Congress found that surface mining operations adversely affect interstate commerce by causing erosion and landslides, by contributing to floods and polluting the water, by destroying fish and wildlife habitats, and by creating dangerous hazards to life and property in coal-mining communities. Congress enacted the surface mining performance standards in Title V in order to protect the environment and the public health and safety.

Congress' factual findings regarding the effects of surface mining on interstate commerce are not irrational, and the means chosen in Title V to deal with these effects are rationally related to the legitimate legislative purpose. That is all that a reviewing court must determine in order to sustain a congressional exercise of the power to regulate interstate commerce. The district court therefore correctly rejected plaintiffs' challenge to Title V under the Commerce Clause.

II

The "steep-slope" performance standards in Sections 515(d) and (e) of the Act do not violate the

Tenth Amendment. The requirements that surface mine operators reclaim mined areas by covering the highwall and restoring the land to its approximate original contour, and that they refrain from dumping spoil on the downslope beneath the mining cut, are addressed solely to the mine operators, not to the "States as States." The Surface Mining Act does not compel the states to do anything whatever.

The "steep-slope" provisions in the Act are thus significantly different from the mandatory federal minimum-wage legislation that this Court invalidated as applied to the states in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). The district court relied erroneously on *National League of Cities* in the present case when it held that Sections 515(d) and (e) of the Act "displace the states' freedom to structure integral operations in numerous areas of traditional functions" and therefore violate the Tenth Amendment. Not only do the "steep-slope" provisions impose no requirements on the states themselves, but surface coal mining is not the kind of "integral governmental function," like police protection or fire prevention, to which this Court referred in *National League of Cities*.

Only two years after the decision in *National League of Cities*, this Court summarily rejected a Tenth Amendment challenge to a federal statute on grounds similar to those now advanced by plaintiffs. *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 84 n.27 (1978). The result should be no different here. A proper exercise of congressional power under the Commerce Clause is not invalid merely because it may have some adverse impact on state and local economies and tax revenues.

III

Sections 515(d) and (e) and 522 of the Act do not take private property without just compensation, in violation of the Fifth Amendment. The district court's ruling to the contrary is based almost entirely on a refusal to grant an appropriate measure of deference to the factual findings made by Congress. Rather than reviewing the legislative findings under the rationality standard repeatedly endorsed by this Court (see, *e.g.*, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-154 (1938)), the district court conducted a 13-day hearing, reweighed the evidence, and, on that basis, overturned the product of several years of legislative work.

The congressional finding that restoration of surface-mined land to its approximate original contour is both physically and economically feasible and environmentally sound is a rational finding supported by ample evidence in the legislative record. The objections to this conclusion now advanced by plaintiffs were fully considered and rejected during the congressional deliberations on the Act. They should not now be subject to a *de novo* judicial reexamination.

An additional important flaw mars the district court's ruling that Sections 515(d) and 522 (e) of the Act take private property, in violation of the Just Compensation Clause. The decision departs significantly from this Court's precedents under the Fifth and Fourteenth Amendments, which establish standards for determining when government regulation rises to the level of a taking. When government regulation serves a substantial public purpose, it ordinarily will not be found to take private property unless it is so intrusive as to prevent all beneficial uses of that property. Mere diminution in the value

of property does not effect a taking. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978).

The Surface Mining Act does not entail any physical invasion or actual government acquisition of private land. In most locations, it permits surface mining operations, subject only to conditions designed to protect the environment and the public health and safety and to ensure restoration of the land after mining has been completed. The Act prohibits surface mining only in certain narrowly defined areas within a specified radius of roads, schools, churches, parks, public buildings, and cemeteries. This is a reasonable regulatory measure that leaves the vast majority of beneficial uses of property completely unaffected.

Moreover, this Court's decisions regarding regulation of noxious uses of private property suggest that the Surface Mining Act would pass constitutional muster, even if the statute were considerably more restrictive. The Court has indicated in a long line of cases that, where government regulation of property use is analogous to prohibition of a nuisance, it will be sustained, even if it leaves no beneficial use available. See, *e.g.*, *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915).

Finally, the approximate original contour requirement in Section 515(d) and the surface mining restrictions in Section 522(e) are, respectively, subject to the variance provisions in Sections 515(c) and (e) and the waiver provisions in Section 522(e). These provisions are intended to ameliorate harsh results that may be caused by the Act in individual circumstances. The district court ignored the waiver and variance provisions and thus contributed to its er-

roneous holding that the Act on its face takes private property without just compensation.

IV

Plaintiffs' due process challenge to the summary cessation order procedure established by Section 521 (a) (2) of the Act and the civil penalty procedure under Section 518 is premature. No plaintiff has alleged or proved that it has suffered any injury as the result of the issuance of a summary cessation order or the imposition of a civil penalty. In the absence of such actual harm, the district court should not have addressed plaintiffs' Due Process Clause arguments.

In any event, neither Section 521(a) (2) nor Section 518 violates the due process guarantee in the Fifth Amendment. Section 521(a) (2) authorizes the issuance of a summary cessation order only when a surface mining operation is in violation of the Act and "creates an imminent danger to the health or safety of the public" or causes "significant, imminent environmental harm to land, air, or water resources * * *." Immediate administrative action in such circumstances is fully consistent with due process.

This Court has frequently recognized that, in extraordinary and emergency situations, summary administrative action may be justified. The statutory standards for the issuance of summary cessation orders under Section 521(a) (2) are quite similar to the criteria provided by Congress in other instances where summary administrative action has been upheld against due process challenges. See cases cited on pages 62-63, 65, *infra*.

Moreover, Congress has included in the Act a comprehensive administrative review procedure designed to ensure that mine operators aggrieved by agency action may obtain a full hearing as expeditiously as

possible. In particular, the Act provides that operators subject to summary cessation orders are entitled to apply for temporary relief and to receive a decision on that application, subject to judicial review, within five days of its receipt by the Secretary. In addition, the operator is entitled to an informal hearing at the mine site within 30 days of the issuance of the cessation order and thereafter to a full evidentiary hearing in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. 554. Together, these procedures strike a reasonable balance between the mine operators' legitimate interest in the uninterrupted extraction of coal and the overriding governmental interest in protecting the environment and the public from dangerous conditions.

The civil penalty provisions in Section 518 likewise satisfy the requirements of due process. Regardless of how the district court may have interpreted the statute, the fact is that no civil penalties are finally assessed until after the affected mine operator has had an opportunity for a hearing. A mine operator who has allegedly violated the Act is informed of the amount of any proposed penalty the Secretary intends to assess and, if the operator "wishes to contest either the amount of the penalty or the fact of the violation," he must "forward the proposed amount to the Secretary for placement in an escrow account." If, after administrative or judicial review, it is determined that no violation occurred or that the proposed penalty should be reduced, the appropriate amount is promptly returned to the operator with interest.

Even standing alone, Section 518 does not violate the Due Process Clause. At least in the absence of some particularized showing of hardship in an individual case, the statutory provision for prepayment

of proposed penalties, coupled with a later refund of excess payments plus interest, adequately protects the mine operators' financial position and simultaneously advances the congressional goal of facilitating the collection of penalties. Under this Court's decisions, due process does not inevitably require a hearing before any deprivation occurs. A full hearing at some time is ordinarily sufficient, and it is undisputed that that is provided by Section 518.

Furthermore, in the present case, the Secretary's construction and application of the Act as a whole deprives plaintiffs' due process argument of whatever force it might otherwise have. In his regulations (43 C.F.R. 4.1100 *et seq.*), the Secretary has construed Sections 518 and 525 of the Act to create two separate avenues of administrative review, and, under the Secretary's interpretation, a mine operator who has received a notice of violation or a cessation order may obtain a full hearing on the fact of the violation without regard to Section 518's prepayment requirement. An operator must seek review under Section 518 (and comply with the prepayment requirement) only if he wishes to challenge not only the fact of the violation but also the amount of the penalty. Even in that event, however, the operator does have an opportunity to obtain some review of the amount of the penalty before prepayment, in an informal conference that the Secretary must hold at the operator's request. See 30 C.F.R. 723.17, 42 Fed. Reg. 62703-62704 (1977).

For all these reasons the civil penalty provisions in Section 518 do not violate the Due Process Clause.

ARGUMENT

I

TITLE V OF THE SURFACE MINING ACT DOES NOT EXCEED CONGRESS' POWER UNDER THE COMMERCE CLAUSE

The district court correctly rejected plaintiffs' Commerce Clause challenge to Title V of the Surface Mining Act, and that portion of the decision below should be affirmed.

As already explained (see page 2, *supra*), Title V contains the Act's principal regulatory and enforcement provisions. Plaintiffs attacked the statute on the ground that it "purports to regulate reclamation of private lands" and other "activities of a local character within the recognized scope of the police powers of the Commonwealth of Virginia" (Complaint ¶¶ 16, 17). In this Court, plaintiffs have asserted (79-1596 J.S. 4) that Title V is "directed not to the 'commerce' aspects of surface mining, i.e. the operations involved in extraction, transportation and sale of surface mined coal, but deals entirely with aspects of land use." On this basis, plaintiffs have argued that Title V exceeds the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution.

The district court properly deferred to the express congressional findings regarding the effects of surface mining on interstate commerce and therefore held that "the federal surface mining act is within the scope of the commerce clause" (J.S. App. 26a). Congress found that surface mining operations adversely affect interstate commerce in several specific ways, and the Surface Mining Act itself includes a description of the adverse effects identified by Congress. Section 101(c) of the Act, 30 U.S.C. (Supp. I) 1201(c), declares Congress' finding that

> many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

See also 30 U.S.C. (Supp. I) 1201(g) ("surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders"); 30 U.S.C. (Supp. I) 1201(j) ("surface and underground coal mining operations affect interstate commerce").

The statutory findings concerning the effects of surface mining on interstate commerce are amply supported in the legislative record,[12] and the district court did not quarrel with the congressional judg-

---

[12] See, *e.g.*, H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 58-60, 96-122 (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. 50-52, 54 (1977). The cited excerpts from the 1977 committee reports are distillations from vast amounts of testimony and documentary material brought to the attention of Congress during the tortuous and lengthy legislative history of the Surface Mining Act. This history is outlined in the Appendix, *infra*.

ment in this regard. In fact, the court adopted the legislative characterization of the Surface Mining Act as an effort to protect commerce from the harmful effects of surface mining. The court stated (J.S. App. 28a-29a; footnote omitted):

> There is no question that coal moves in interstate commerce and that its production has a substantial effect on the national economy. * * * The Surface Mining Control and Reclamation Act of 1977 is an attempt by Congress to insure that surface mining of this valuable commodity is accomplished with regard to its impact on interstate commerce and the public welfare. Congressional recognition of the enormous and multi-faceted implications for commerce of improper reclamation * * * pervades the act's legislative history. Congress considered improper surface mining and reclamation a threat to the productivity of the mined land in terms of its ability to support other important forms of commerce. * * * Surface mining of coal in the United States may involve the temporary or permanent degradation of vast tracts of lands, a problem greatly magnified by developing mining technologies. If the land is not reclaimed in a manner that subjects it to further use, then the productivity of that land is lost to present as well as future generations, reducing the flow of other valuable items in interstate commerce. More important than the adverse economic effects on interstate commerce, however, are the *potential* costs in terms of stream pollution, floods, landslides, loss of fish and wildlife habitats, erosion of other lands, and hydrological imbalances that cumulatively have a substantial impact on interstate commerce.

Having thus acknowledged the relationship between surface mining operations and interstate com-

merce, the district court correctly recognized that its role on judicial review was limited to determining whether Congress had a "rational basis" for enacting a particular regulatory scheme for the protection of commerce (J.S. App. 28a). After considering the provisions of the statute under attack, the court concluded that "Congress had a real and substantial rational basis for enacting the federal surface mining act to protect commerce and the national interest" (*id.* at 29a). This decision is fully consistent with the many precedents from this Court governing the proper standards for judicial review of Commerce Clause legislation. Accordingly, the district court's ruling should be affirmed in this respect.

The Commerce Clause grants Congress plenary power "[t]o regulate commerce * * * among the several States * * *." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *National League of Cities* v. *Usery*, 426 U.S. 833, 840 (1976); *Cleveland* v. *United States*, 329 U.S. 14, 19 (1946). This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, *supra*, 22 U.S. (9 Wheat.) at 196. In particular, this Court has repeatedly held that the Commerce Clause power extends not only to "the use of channels of interstate or foreign commerce" and "protection of the instrumentalities of interstate commerce * * * or persons or things in commerce," but also to "activities affecting commerce." *Perez* v. *United States*, 402 U.S. 146, 150-152 (1971), and cases there cited.

In determining whether a particular exercise of power is valid under the Commerce Clause, a reviewing court must defer to a finding by Congress that the regulated activity affects interstate commerce, if there is any rational basis for that finding. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241,

258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424 (1940). If there is a rational basis for such a finding, the only remaining question for judicial consideration is whether the means selected by Congress for the regulation of commerce are "reasonable" and "rational." *Heart of Atlanta Motel, Inc., supra*, 379 U.S. at 258-259; *Katzenbach* v. *McClung, supra*, 379 U.S. at 304. Once a court determines that Congress acted rationally in adopting a particular regulatory scheme, the judicial inquiry is completed. *Ibid.*

Plaintiffs concede (79-1596 J.S. 6) that coal is a commodity that moves in interstate commerce. They also apparently do not challenge the congressional findings regarding the effects of surface coal mining on interstate commerce. Plaintiffs contend, however, that the Surface Mining Act exceeds Congress' power under the Commerce Clause, because the statute deals with "aspects of land use" rather than "the operations involved in extraction * * * of surface mined coal" (*id.* at 4). Plaintiffs have not explained this purported distinction, and it is difficult to understand how Congress could regulate the extraction of surface mined coal—which plaintiffs seemingly agree is a permissible exercise of the Commerce Clause power—without at the same time affecting some "aspects of land use." In any event, the distinction drawn by plaintiffs is fallacious, because it entails a significant mischaracterization of the purpose of the Surface Mining Act.

The regulatory scheme created by Title V of the Act is in fact primarily concerned with "operations involved in extraction * * * of surface mined coal." That is the very subject with which the statute was intended to deal. As described above, Congress based its decision to adopt the Surface Mining Act on ex-

press findings that the methods used in extracting coal frequently have a direct and adverse impact on interstate commerce. Plaintiffs have offered no basis for concluding either that Congress' findings are irrational or that the means chosen for controlling the adverse impacts of surface coal mining are ill-suited to the task. The federal courts have uniformly held that the power conferred by the Commerce Clause is broad enough to permit Congress to regulate activities giving rise to air pollution, water pollution, or other environmental hazards,[13] and plaintiffs do not dispute that the kinds of problems identified by Congress can appropriately be addressed through Commerce Clause legislation. In these circumstances, there is no remaining foundation for plaintiffs' argument that, because of its likely effects on land use, the Surface Mining Act exceeds congressional power to regulate interstate commerce.

The Surface Mining Act does not require that land be used in any particular way. It does not require that coal be mined and it does not prohibit the surface mining of coal, except in certain narrowly defined situations. It also does not mandate a particular postmining land use once the operator's performance

---

[13] See, *e.g.*, *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979); *Sierra Club* v. *EPA*, 540 F.2d 1114, 1139 (D.C. Cir. 1976), cert. denied, 430 U.S. 959 (1977); *Bethlehem Steel Corp.* v. *Train*, 544 F.2d 657, 663 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977); *District of Columbia* v. *Train*, 521 F.2d 971, 988 (D.C. Cir. 1975), vacated and remanded on other grounds *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) (per curiam); *United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974); *Pennsylvania* v. *EPA*, 500 F.2d 246, 259 (3d Cir. 1974); *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 677 (1st Cir. 1974); *United States* v. *Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968), aff'd, 423 F.2d 469 (4th Cir.), cert. denied, 398 U.S. 904 (1970).

bond has been released. The Act provides only that mining operations must be conducted subject to certain precautions and restrictions, and, if surface mining methods are used, mined land must be restored to its approximate original contour at the completion of mining activities. Plaintiffs' charge that the Act was intended to control land-use decisions by private property owners is simply inaccurate.

Plaintiffs' further assertion (79-1596 J.S. 4-5) that, by enacting Title V, Congress has "created a comprehensive body of federal police powers designed to supplant the inherent police powers of State and local governments" adds nothing to their argument. As this Court has stated, "[i]t is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Darby*, 312 U.S. 100, 114 (1941); *Cleveland* v. *United States*, *supra*, 329 U.S. at 19; *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 147 (1938). The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over purely intrastate commerce. *United States* v. *Darby*, *supra*, 312 U.S. at 116; *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 569-570 (1939). Moreover, as this Court has recently reaffirmed (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 840), Congress, in regulating private activities that affect interstate commerce, may preempt state laws that are contrary to the federal regulatory scheme. In particular, the Commerce Clause authorizes Congress to preempt state police power regulations that are inconsistent with the federal statute governing surface coal min-

ing activities.[14] Plaintiffs' contention that the Surface Mining Act exceeds the delegated power of Congress is, therefore, without merit.[15]

---

[14] Plaintiffs have cited no pertinent authority in support of their argument that the Surface Mining Act is outside the scope of Congress' power under the Commerce Clause. Several of the cases to which plaintiffs refer (79-1596 J.S. 5) merely held that regulation of private land use is within the inherent police powers of the states and their political subdivisions, but these cases in no way suggest that such powers are exclusive or that the federal government may not regulate private activities that affect interstate commerce. The other decisions cited by plaintiffs (*id.* at 6) hold only that the states retain authority to regulate activities that do not affect interstate commerce and activities that may affect interstate commerce but concerning which Congress has not chosen to legislate.

[15] The present case is not the only one in which a federal district court has considered a Commerce Clause challenge to the Surface Mining Act or to the Act's application in particular circumstances. Such challenges have also been rejected in *Andrus* v. *P-Burg Coal Co.*, 495 F. Supp. 82 (S.D. Ind. 1980), appeal pending, No. 80-1916 (7th Cir.), and *Star Coal Co.* v. *Andrus*, Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980) (failure to demonstrate probability of success on merits), appeal pending on other grounds, No. 80-49. See also *Concerned Citizens of Appalachia, Inc.* v. *Andrus*, 494 F. Supp. 679, 683 (E.D. Tenn. 1980), appeal pending, No. 80-1448 (6th Cir.) (rejecting Tenth Amendment challenge to the Surface Mining Act and commenting that "[t]he Congressional purpose of protecting the environment from dangers arising in the course of nationally significant commercial activity is well within the Commerce Clause power" and "[t]he means used to achieve that purpose are directly and rationally related to activity subject to Congressional regulation under the Commerce Clause").

The only case in which a Commerce Clause objection to the Surface Mining Act has been sustained is *Indiana* v. *Andrus*, Civ. Nos. IP 78-500-C and IP 78-501-C (S.D. Ind. June 10, 1980), appeal pending, No. 80-231. The district court's opinion in *Indiana* did not treat Title V as an undif-

II

THE "STEEP SLOPE" PROVISIONS OF THE SURFACE MINING ACT DO NOT VIOLATE THE TENTH AMENDMENT

Sections 515(d) and (e) of the Surface Mining Act set performance standards for surface mining on "steep slopes." [16] Section 515(d) requires an operator conducting surface mining on steep slopes (i) to reclaim the mined area by completely covering the highwall and returning the site to its "approximate original contour," [17] (ii) to refrain from dumping spoil material on the downslope below the bench or mining cut, and (iii) to refrain from disturbing land above

---

ferentiated whole but focused primarily on the so-called "prime farmland" provisions of the Act, which are not at issue here. The Commerce Clause aspects of the district court's ruling in *Indiana* are discussed in Part I of the Secretary's brief in that case, a copy of which will be sent to plaintiffs here.

[16] Under Section 515(d)(4), a "steep slope" is defined as "any slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State."

[17] The term "approximate original contour" is defined in Section 701(2) of the Act, 30 U.S.C. (Supp. I) 1291(2), as follows:

> "approximate original contour" means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated * * *.

(The word "approximate" in Section 515(d)(2) was erroneously printed as "appropriate" in the final version of the statute.)

the highwall, unless permitted to do so by the regulatory authority. 30 U.S.C. (Supp. I) 1265(d). Section 515(e) establishes a procedure by which a steep-slope mine operator may obtain a variance from the approximate original contour requirements of Section 515(d), if such a variance is needed to render the land suitable for a post-reclamation industrial, commercial, residential, or public use that is "deemed to constitute an equal or better economic or public use" than would otherwise be possible. 30 U.S.C. (Supp. I) 1265(e).[18]

The district court held that Sections 515(d) and (e) violate the Tenth Amendment (J.S. App. 30a-41a). The court reached this result on the basis of purported "findings" that the steep-slope mining requirements force the Commonwealth of Virginia to relinquish control over land-use planning, deprive the Commonwealth of authority over its economy, and cause actual economic harm (*id.* at 33a-39a). In particular, the district court stated that compliance with the steep-slope mining requirements is "economically infeasible and physically impossible" (*id.* at 37a). Relying heavily on *National League of Cities* v. *Usery*, *supra*, the district court concluded that the Surface Mining Act "operates to displace the states' freedom to structure integral operations in numerous areas of traditional functions" (J.S. App. 18a) and therefore invades the powers reserved to the states by the Tenth Amendment.

---

[18] In addition, Section 515(c) establishes a separate variance procedure applicable in cases in which an operator extracts coal, not by cutting into the side of a mountain, but by removing and leveling the mountain top.

For a general description of surface mining methods and terminology, see H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 76-80, 97-105 (1977).

The district court's decision misapplies *National League of Cities;* the Surface Mining Act regulates only coal mine operators, not states. Unlike the mandatory application of federal minimum-wage legislation to state employees, which the Court disapproved in *National League of Cities*, the steep-slope mining requirements of Sections 515(d) and (e) are directed solely at private activities and do not seek to regulate the "States as States." See 426 U.S. at 845. As this Court emphasized in *National League of Cities* (426 U.S. at 840), the Tenth Amendment does not restrict Congress' power under the Commerce Clause to regulate nongovernmental activities.

> Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 262 (1964).[19]

The district court unsuccessfully attempted to avoid the reasoning of *National League of Cities* by stating that, "[w]hile the act ultimately affects the coal mine

---

[19] The Ninth Circuit has recently followed these principles in *United States* v. *Helsley*, 615 F.2d 784 (1979), sustaining the federal Airborne Hunting Act against a Tenth Amendment attack. The court held that the challenged statute "regulates private conduct, not the functions of a state acting in its political capacity. The federal act does not impair state sovereignty in any aspect which is reserved exclusively to the states. * * * A state's control over its resources, including wildlife, does not prohibit the proper exercise of federal power under provisions such as the commerce clause." *Id.* at 787-788 (citation omitted).

operator, its pervasive effect is on the states' legislative authority and on state control of land within its boundaries" (J.S. App. 32a). But the Act does not compel the states to enforce the steep-slope standards or to expend any state funds. The states are encouraged to enforce the Act's provisions, but there is no statutory requirement that they enforce any particular standard or that they pursue any regulatory measures at all. The states are not required to participate in any manner whatever. If they do not wish to submit a proposed permanent program that complies with the Surface Mining Act and the accompanying regulations promulgated by the Secretary, they need not do so. In that event, the full regulatory burden will be borne by the federal government.

Moreover, the regulation of surface coal mining is not the kind of "integral governmental function" protected by the Tenth Amendment. The Court in *National League of Cities* faulted the mandatory application of federal minimum-wage legislation to state employees on the ground that it would "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." 426 U.S. at 851. The Court observed that "[t]hese activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services" (*ibid.*). The problem with the federal minimum-wage law, in the Court's view, was that it would "withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest" and thus would threaten the states' "separate and independent existence" (*ibid.*).

The Surface Mining Act poses none of these difficulties. The regulation of surface coal mining is not an integral governmental function like the providing of police services or other basic public services traditionally associated with state or local governments. Regulation of surface coal mining by the federal government does not in any sense threaten the states' "separate and independent existence." It does not intrude on the states' relationship with their own employees. Rather, the regulation of surface coal mining involves only the regulation of "individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside." 426 U.S. at 845. In this enterprise, Congress is empowered to preempt state law without infringing the Tenth Amendment. *Id.* at 840.[20]

The federal courts have uniformly sustained federal laws, passed in the exercise of powers delegated to Congress under Article I of the Constitution, that leave to the states the choice whether and to what extent to participate in a federal regulatory scheme. See, *e.g.*, *Friends of the Earth* v. *Carey*, 552 F.2d 25, 36-39 (2d Cir.), cert. denied, 434 U.S. 902 (1977); *Sierra Club* v. *EPA*, 540 F. 2d 1114, 1140 (D.C. Cir. 1976), cert. denied, 430 U.S. 959 (1977). Indeed, statutes establishing programs of cooperative federalism, such as the Surface Mining Act and the

---

[20] Indeed, in his concurring opinion in *National League of Cities*, Mr. Justice Blackmun expressly recognized that the Court's decision "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856.

Clean Air Act (at issue in *Friends of the Earth*), leave the states with substantially more flexibility with respect to the subject matter involved than do other federal laws that this Court has already sustained against Tenth Amendment challenges.

For example, in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), the Court summarily rejected appellees' argument that the Price-Anderson Act's limitation on liability arising from a nuclear accident violated the Tenth Amendment because it encroached on "the right of the state to protect its own property and its interest in protecting the lives and dwellings of its inhabitants * * *." 77-262 Appellees' Br. 35. The Court disposed of this contention in a footnote, saying that "[n]othing in *National League of Cities* or in our prior due process cases provides any support for this claim" (438 U.S. at 84 n.27). The Court reached this result notwithstanding the Price-Anderson Act's virtually complete preemption of state tort law as far as nuclear accidents are concerned.

Similarly, in *United States* v. *California*, 297 U.S. 175 (1936), the Court rebuffed a constitutional attack on the federal Safety Appliance Act as applied to a state-owned and operated railroad. The continuing validity of the *California* decision was recently reaffirmed in *National League of Cities*, where the Court stated that "California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad" (426 U.S. at 854 n.18). Unlike the situation in *California*, the state in the

present case is not directly regulated by the federal statute at issue. The Commonwealth of Virginia presses its Tenth Amendment arguments, not as a surface mine operator subject to federal regulation, but as another regulator of surface mining whose regulations have been in part preempted by federal law. As long as the Act of Congress involved is within the powers delegated to the Legislative Branch by Article I of the Constitution, there is no Tenth Amendment violation in such circumstances.

The foregoing reasoning and precedents are not affected by the district court's characterization of Sections 515(d) and (e) as land-use measures (J.S. App. 34a-39a). The primary purpose of the steep-slope mining requirements is protection of the environment and the public health and safety. See, *e.g.*, H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 80, 120 (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. 50-51 (1977).[21] Any land-use consequences are alto-

[21] In passing the Surface Mining Act, Congress was motivated in part by the perceived inadequacies of existing state regulatory programs. The Senate Report stated that "[w]hile many States already do have laws regulating surface coal mining operations, in many instances these laws are inadequate, or are not fully enforced. Most existing State laws and Federal regulations for surface mining and reclamation are inadequate in that they are tailored to suit ongoing mining practices, rather than requiring modification of mining practices to meet established environmental standards." S. Rep. No. 95-128, *supra*, at 51-52. See also Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. Va. L. Rev. 553 (1979), in which Representative Udall, the chief sponsor of the Surface Mining Act and Chairman of the House Committee on Interior and Insular Affairs, recalled the Committee's finding that "the legitimate and irresistable [sic] urge on the part of a state to protect its coal industry from competitive disadvantage, vis-a-vis coal producers in other states, usually overwhelmed most state legislatures' desire to impose sound

gether incidental, especially since the challenged subsections have as their goal the return of land to approximately the same condition as existed before mining began. Once reclamation of the mined land is complete, the Commonwealth of Virginia and other states remain free to exercise their full powers over the restored land. Moreover, the reclamation requirements imposed by the Act are not absolute. The variance procedures in Section 515 add flexibility to the "approximate original contour" rule and ensure that, in appropriate circumstances and with adequate environmental safeguards, mine operators and land owners will be permitted to create usable flat land on steep slopes, if that is needed for an "equal or better economic or public use" after mining is completed. The impact of the Act on land-use decisions will thus be no greater than necessary to achieve the Act's legitimate environmental and public safety goals.

The remaining justification asserted by the district court for its Tenth Amendment ruling is that the steep-slope mining requirements will cause serious harm to Virginia's economy and will result in "destruction of the taxing power of certain counties, cities, and towns" (J.S. App. 40a). This conclusion is based primarily on the district court's erroneous premise that compliance with the steep-slope requirements is "economically infeasible and physically impossible" (*id.* at 37a). Congress has made contrary findings as to the practicability of Sections 515(d) and (e), and those findings are amply supported by the evidence in the legislative record as well as the

---

reclamation laws. Well motivated people on the state level did what they could, but without federal standards political reality militates in favor of loose controls" (*id.* at 553; footnotes omitted).

evidence presented at the trial in this case. See pages 43-47 and note 29, *infra*.

The district court's contrary "findings" as to the effects of the steep-slope mining requirements on the Commonwealth's economy are speculative and not supported by the evidence. They are certainly insufficient to outweigh the voluminous legislative record developed through weeks of hearings, committee meetings, and floor debate spread over a nine-year period. See the Appendix, *infra*. For example, the district court found that "there is a great need for level land in the seven counties that comprise the coal fields of Virginia" and that the "approximate original contour" requirement would prevent the creation of such land and would thereby retard economic growth in southwestern Virginia (J.S. App. 36a-37a). The evidence actually showed, however, that there are today substantial amounts of flat bench land in southwestern Virginia, that most of these flat bench lands are not presently being used for industrial, commercial, or residential purposes, and that in most instances mine benches or other level lands resulting from surface mining will not be suitable for future development.[22]

---

[22] In particular, an infrared aerial photograph of the coal-producing area of southwestern Virginia (Def. Exh. 42; Tr. 1718, 1719) showed that, although substantial amounts of unreclaimed bench land have undergone mountaintop removal near the population centers of Norton and Wise, Virginia, no construction activity has begun on these sites except in the area of the Norton, Virginia, shopping center (Tr. 1717-1718, 1729-1730, 2493-2495, 2497).

Ralph R. Widner, a regional development expert and former chairman of the Appalachian Regional Commission, testified that most of the flat bench lands in Appalachia are unsuitable for significant development because of insufficient space for roads, utilities, and other facilities (Tr. 2821-2824). He also stated that flat bench lands have a very low utility for agricultural development (Tr. 2826). Finally, Mr. Widner testi-

In any event, even assuming that the Act's requirements will have a measurable impact on the economy

---

fied that there are already more flat bench lands in Appalachia than will ever be developed (Tr. 2826). (Two different sets of pages in the trial transcript are numbered 2821 through 2830. All references here are to the first such set of pages.)

Contrary to the district court's purported "findings" (J.S. App. 38a), the record contains no convincing evidence that any significant number of coal companies in Virginia have gone out of business as a result of the Surface Mining Act's steep-slope mining requirements. Dr. Richard Newcomb, an expert in the field of mineral economics, testified that the coal industry is normally cyclical in nature due to a number of different market factors and that at the time of trial the coal industry was in a short-term slump due to an oversupply of coal (Tr. 1230-1233). According to Dr. Newcomb, the resulting decline in market prices causes decreasing employment and the exiting of marginal operators from the industry, either on a permanent or temporary basis (Tr. 1233, 1238-1239, 1245-1246). In his opinion, the Surface Mining Act will have a minimal economic impact on the coal mining industry and any such impacts on the surface coal mining industry in Virginia will be much smaller than the impact of traditional market factors (Tr. 1250).

The district court's finding that Virginia coal companies have gone out of business as a result of the Act is apparently based in large part on the testimony of Danny R. Brown, Deputy Commissioner of the Virginia Division of Mined Land Reclamation. Mr. Brown testified that, since February 3, 1978 (the effective date of the Act's interim regulatory program), 24 Virginia coal mining operations have ceased because of the federal law (Tr. 2714, 2720). This testimony was based on a summary of a survey (Commonwealth Exh. 13; Tr. 2714-2715, 2720) conducted by Virginia state mine inspectors. The probative value of this survey is highly dubious, however. Mr. Brown testified that he did not know what questions had been asked in the survey (Tr. 2715, 2718-2719), that he did not know how the survey respondents had been chosen (Tr. 2739), that the survey was taken strictly for purposes of this litigation (Tr. 2716), that the survey did not indicate which provisions of the Surface Mining Act had supposedly

of the Commonwealth, this kind of effect, standing alone, is insufficient to establish a Tenth Amendment violation. In *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534-535 (1941), this Court rejected the theory that an adverse impact on state and local economies and tax revenues is a barrier to Congress' exercise of its power under the Commerce Clause. In *National League of Cities*, the Court discussed the possible economic impacts of the statute involved (426 U.S. at 846-847) but made clear that the determinative factor was the nature of the federal action and its displacement of integral state functions, not its economic effect. *Id.* at 847.[23]

---

caused mine operations to cease (Tr. 2739-2740), and that the survey did not even show that any mining companies had actually gone out of business—only that particular mining operations, *i.e.*, operations under particular permit numbers, had ceased for some reason (Tr. 2736-2738).

Furthermore, the district court's finding (J.S. App. 38a) that employment in Virginia decreased because of the steep-slope mining requirements is unsupported. In fact, Fred W. Walker, Director of the Virginia Department of Conservation and Economic Development, testified that employment in the Virginia coal industry has continued to grow since enactment of the Surface Mining Act (Tr. 80). Although B.V. Cooper, President of the Virginia Surface Mining and Reclamation Association, claimed that his organization had documented 500 lay-offs in the Virginia surface mining industry since the Act went into effect (Pr. Tr. 36-37), he also admitted that there had been a slump in the coal market for the past few months and that the vitality of surface mining operations was cyclical (Pr. Tr. 53-54). ("Pr. Tr." refers to the transcript of the preliminary hearing in February 1979.)

[23] Two other federal district courts have already rejected Tenth Amendment challenges to the Surface Mining Act. See *Star Coal Co.* v. *Andrus*, Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980) (failure to demonstrate probability of success on merits), appeal pending on other grounds, No. 80-49; *Concerned Citizens of Appalachia, Inc.* v. *Andrus*, 494 F. Supp. 679 (E.D. Tenn. 1980), appeal pending, No. 80-1448

III

SECTIONS 515(d) AND (e) AND SECTION 522 OF THE SURFACE MINING ACT DO NOT VIOLATE THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

A. The district court ruled that Sections 515(d) and (e) of the Surface Mining Act take private property without just compensation, because restoration of steep-slope surface mines to their approximate original contour is "economically and physically impossible," and therefore the statutory "approximate original contour" requirement renders coal mining "physically and economically impossible" (J.S. App. 44a-45a). In addition, the court held that, even if steep-slope surface mines could be restored to their approximate original contour, the value of the mined land after such restoration would be "diminished to practically nothing" (*id.* at 45a). The district court similarly decided that Section 522 of the Act effects an unconstitutional taking, because Sections 522(e)(4) and (5) expressly prohibit surface mining in certain locations and thus "clearly prevent[] a per-

---

(6th Cir.). See also *Holmes Limestone Co.* v. *Andrus*, Civ. No. C80-933A (N.D. Ohio Oct. 7, 1980), appeal pending, No. 80-3666 (6th Cir.) (holding that individual mine operator lacks standing to assert Tenth Amendment rights of the State of Ohio).

The only other case in which a Tenth Amendment objection to the Surface Mining Act has been sustained is *Indiana* v. *Andrus*, Civ. Nos. IP 78-500-C and IP 78-501-C (S.D. Ind. June 10, 1980), appeal pending, No. 80-231. The Secretary believes that the Tenth Amendment aspects of the district court's decision in *Indiana* are erroneous for the same reasons that the district court's Tenth Amendment ruling in the present case is incorrect.

son from mining his own land or having it mined" (*id.* at 56a).[24]

The district court explained its Fifth Amendment ruling in the following terms (J.S. App. 53a-54a):

> There are those in every generation who believe that private property should be taken without compensation whenever it is for the public good as conceived by them. This generation is no exception and exponents of this belief fill the halls of Congress and the bureaucracy and infiltrate the courts. The right of a person to own land and the protection of that right were sacred tenets of the common law; and it is no less sacred today as the population booms. We are aware that God only created so much land; that each parcel is considered unique; therefore, as the desire for land increases and the parcels of ownership become smaller and smaller the importance of the Fifth Amendment increases rather than diminishes.

B. The district court's holding that Sections 515 (d) and (e) and Section 522 take private property without just compensation suffers from a fatal threshold deficiency. Neither plaintiffs nor the district court identified any particular piece of property in which

---

[24] Because the district court objected only to provisions contained in Section 522(e), it is unclear why the court's order (J.S. App. 19a) declares all of Section 522 unconstitutional. This aspect of the court's order is especially puzzling because Sections 522(a)-(d) do not become applicable to state and private land until the permanent phase of the Act's regulatory program. These provisions, which establish procedures for designating particular lands as unsuitable for some or all surface mining, have not been applied to plaintiffs or any other private landowners in Virginia. Accordingly, no justiciable case or controversy exists with respect to Sections 522(a)-(d). *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-91 (1947).

plaintiffs have an interest that has allegedly been taken by operation of the statute. The district court reached its decision under the Just Compensation Clause without reference to particular tracts of land or the extent of diminution in the value of such tracts attributable to the Act. By proceeding in this manner, the court ignored this Court's oft-repeated injunction that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. See, *e.g.*, *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588 (1972); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-575, 584 (1947). As the Court explained in *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945) (citations omitted):

> It has long been [this Court's] considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied.

The Court's insistence that constitutional issues be raised in a specific factual context is particularly appropriate when allegations of a taking of private property in violation of the Just Compensation Clause are involved. Only last Term, this Court stressed the need to evaluate claims of government takings on the basis of individualized findings regarding all relevant economic factors.

> [T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by

> the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance.

Kaiser Aetna v. *United States*, 444 U.S. 164, 175 (1979) (citations omitted). In the absence of such an "ad hoc, factual inquiry," there is no reason to conclude that the Act will always effect a taking of private property, or, indeed, that it will ever do so. The taking questions presented by plaintiffs to the district court were therefore not ripe for judicial determination.

At a minimum, because of the abstract fashion in which plaintiffs' taking claim was raised, the proper scope of the district court's review was quite limited. The only question properly before the court was whether the "mere enactment" of the Surface Mining Act constitutes a taking. *Agins* v. *Tiburon*, No. 79-602 (June 10, 1980), slip op. 4. Plaintiffs cannot legitimately complain about the way in which the Act has been or will be applied in particular circumstances, because they have not availed themselves of the opportunities provided by the statute to obtain administrative relief from the "approximate original contour" requirement in Section 515(d) or the surface mining restrictions in Section 522(e). If plaintiffs had attempted to obtain a variance under Sections 515(c) or (e) or a waiver under Section 522 (e), a mutually agreeable accommodation might have been reached with respect to individual properties, and constitutional questions might have been avoided. The potential for such administrative solutions under the Surface Mining Act helps to demonstrate why

Fifth Amendment taking claims ordinarily should not be adjudicated in the absence of a full factual record focusing on specified parcels of private property.

C. In any event, the district court's holding that the mere enactment of Title V effects an uncompensated taking of property is incorrect. The court's purported "finding" that compliance with the "approximate original contour" requirement of Section 515(d) is "economically and physically impossible" (J.S. App. 37a-38a, 44a) completely ignores Congress' explicit findings that restoration of steep-slope mines to their approximate original contour is feasible and economically practical. See, *e.g.*, H.R. Rep. No. 95-218, *supra*, at 80, 120-124; S. Rep. No. 93-402, 93d Cong., 1st Sess. 43-45 (1973). After careful consideration of the available evidence, Congress concluded not only that such restoration is physically and economically achievable, but also that it was already being accomplished in several Appalachian states.[25] H.R. Rep. No. 95-218, *supra*, at 97, 123-124; S. Rep. No. 93-402, *supra*, at 44-45. A colloquy on the floor of the House shortly before the vote to accept the conference report on the bill that became the Surface Mining Act is instructive in this regard. Representative Wampler of Virginia raised many of the same objections to the proposed legislation that plaintiffs now urge in this litigation.[26] He stated (123 Cong. Rec. 24426 (1977)):

---

[25] We particularly invite the Court's attention to pages 98-100 of the House Report. These pages contain photographs of surface mining sites on steep slopes that have been successfully returned to approximate original contour. The results shown belie the district court's assertion that such restoration is physically impossible.

[26] Representative Wampler testified as a witness for plaintiffs in the district court (Tr. 2452-2528).

> The prohibition of spoil on the downslope, and the prohibition against any exposed highwall after reclamation are sufficient in themselves to severely curtail, if not completely eliminate the surface mining industry in the Appalachian area, notably the small operators who produce the majority of the percentage of surface coal mined.

Representative Murphy of Pennsylvania responded (*ibid.*):

> Mr. Speaker, I would like to allay the fears of my colleagues from Idaho, from Virginia, and from some of the other States who are in opposition to this conference report.
>
> From 1961 through 1963, when I was a young member of the Pennsylvania Legislature, I heard many of these arguments. I live in a coal area; I live in a part of Appalachia; I live in the mountains.
>
> I want to tell the Members that there is more coal being stripped in western Pennsylvania today than at any other time in the history of the State of Pennsylvania. That includes the free-wheeling days of strip mining in the 1940's when they used the excuse of winning World War II to desecrate many sections of Pennsylvania, Ohio, and West Virginia.
>
> This mining today is being conducted by large and small operators. It is being conducted at a profit. The land is being backfilled to the high wall; it is backfilled to contour. We have no more high wall in Pennsylvania. I invite the Members to come and see our reclaimed areas in Pennsylvania today.
>
> The only thing that is causing us a problem is a result of strip mining operations of past years. The reclaiming of these stripped lands costs millions and millions of Pennsylvania tax-

> payer dollars that are needed to reclaim our land. That we are doing.
>
> But today strip mining in Pennsylvania is regulated, and yet it is more profitable than ever, and coal is more plentiful than ever.

Representative Regula of Ohio gave a similar answer to the Act's opponents (*id.* at 24426-24427):

> I think we tend to overlook the fact that in establishing uniform rules for the national development of our coal reserves we are going to encourage greater production. People will now know what kind of equipment to buy, and they will know what kind of operations to develop. The establishment of the rules embodied in this legislation, with the uncertainty that will be removed by the signing of it, is very vital to the increased production of coal.
>
> As the gentleman from Pennsylvania (Mr. Murphy) pointed out, there were arguments against regulation in Pennsylvania, and I heard all the same arguments in the Ohio Legislature some years ago when we developed a bill that is very similar to what we are passing today. Yet when one drives through Ohio today, we find that we do have increased mining, and that the land is being restored to a useful purpose. Certainly the Ohio results have been gratifying, and I am confident that this bill will be achieving the same results at the national level.

The foregoing exchange is typical of the debate that characterized the entire legislative consideration of the Surface Mining Act. It is illustrative of the kind of arguments that are made on virtually every occasion that Congress contemplates a major piece of regulatory legislation. Here, however, in part because of the vigorous political battle waged by congressional advocates for both sides, the legislative investigation of surface mining techniques and recla-

mation methods was unusually thorough in both breadth and depth. The legislative findings regarding the feasibility of the steep-slope mining requirements were based on consideration of technical studies and extensive congressional hearings as well as actual on-site visits by congressional committee members. See, *e.g.*, H.R. Rep. No. 95-218, *supra*, at 97; Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. Va. L. Rev. 553, 554, 557 (1979);[27] Council on Environmental Quality, *Coal Surface Mining and Reclamation: An Environmental and Economic Assessment of Alternatives* 27-30, 42 (1973) (hereafter "CEQ Report").[28] See generally the voluminous legislative history summarized in the Appendix, *infra*. For example, relying specifically on a recent study of steep-slope surface mining in Eastern Kentucky, Congress concluded that

---

[27] Representative Udall described the process that resulted in passage of the Surface Mining Act in the following terms (Udall, *supra*, 81 W. Va. L. Rev. at 554):

> * * * a legislative endeavor involving 183 days of hearings and legislative consideration, eighteen days of House action, three House-Senate Conferences and Reports, eleven Committee Reports, two Presidential vetoes, approximately fifty-two recorded votes in the House and Senate, and the machinations (and statesmen-like conduct) of three Presidents * * *.

[28] The CEQ Report summarized its findings on the economic feasibility of surface mine reclamation in the following way (CEQ Report at 30; footnote omitted):

> In summary, for the model operations evaluated, the costs of advanced reclamation techniques are small compared to the market value of the coal, e.g., only 3 to 9 percent of the price of the coal at the mine. In fact, since coal can be produced by surface mining in Appalachia for $0.75 to $2.50 per ton less than by underground mining, the competitive position of surface mined coal would not deteriorate even at the highest range of reclamation costs.

"[t]he study and recommendations fully support the position that the requirement of regrading of mountain mining sites to approximate original contour and limitations on dumping spoil downslope are necessary, workable, and should not result in any significant reduction of coal supply." H.R. Rep. No. 95-218, *supra*, at 122-123.

The district court erred by failing to accord any deference to these specific legislative findings regarding the feasibility of the steep-slope mining requirements. The court disregarded the well-established principle that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality * * *." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). See also *Duke Power Co.* v. *Carolina Environmental Study Group, supra*, 438 U.S. at 83-84. One who attacks the factual basis of a legislative enactment bears the heavy burden of showing that there is no rational factual basis that can support the legislation. *Katzenbach* v. *McClung, supra*, 379 U.S. at 303-304; *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 594 (1939); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-154 (1938); *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 37-38 (1923). Where the evidence before Congress is merely conflicting, a court may not reweigh the evidence and substitute its judgment for that of the legislature. *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 n.10 (1976). As this Court said more than 40 years ago in *Carolene Products* (304 U.S. at 152-154):

> Even in the absence of [legislative findings or committee reports,] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it

> is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. * * *
>
> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry * * *. But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. * * * [N]either the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

The district court ignored these salutary precepts of judicial review and, on the basis of a 13-day trial, overturned the product of several years of legislative deliberation. As the case comes to this Court, the question is not whether the district court's purported "findings" are clearly erroneous, but whether Congress rationally could have reached different factual conclusions and been impelled thereby to enact the Surface Mining Act. The legislative record leaves no doubt that the Act and, in particular the "approximate original contour" requirement in Section 515(d), is a rational congressional response to the severe environmental and health and safety problems created by steep-slope surface mining.[29]

---

[29] Even when evaluated solely on the basis of the trial record, the district court's findings are not supported by the weight of the evidence. The Secretary presented substantial evidence that it is both physically possible and economically practical for steep-slope surface mine operators to restore mined land to its approximate original contour (Tr. 977-978, 1158, 1168-1169, 1171, 1217, 1788-1789, 1807-1808), to cover

The district court's assertion that "compliance with [the Act's] provisions has a higher potential for

---

the highwalls of mining cuts (Tr. 1159, 1161-1162, 1164, 1796, 1807, 1812-1813), and to avoid the dumping of spoil on the downslope (Tr. 1058, 1088-1092, 1158, 1165, 1168-1172, 1806).

In particular, Ronald D. Hill, an expert on surface mining reclamation and water pollution, testified that the statutory standards could be achieved by use of the so-called "block cut" or "haulback" method of surface mining (Tr. 1094-1095, 1098-1099, 1169-1171, 1196-1197). See also H.R. Rep. No. 95-218, *supra*, at 123. This method involves removing the "first cut" of overburden from the mining area, taking it to a planned disposal area, and then backfilling each successive cut into the pit area left by each preceding cut as the operation continues around the mountain contour (Tr. 1094-1095). The method eliminates the necessity of casting the overburden or spoil on the downslope beneath the mining cuts (Tr. 1094, 1098-1099). Mr. Hill testified that the method reduces water pollution and erosion (Tr. 1098, 1170-1171) and is already used extensively for steep-slope mining operations in West Virginia, Pennsylvania, and Kentucky (Tr. 1099). He also testified that the same techniques could be applied on steep slopes in Virginia (Tr. 1158, 1213-1215).

Dr. David R. Maneval, an expert on mineral engineering and surface mining reclamation, testified that in his opinion the Act's steep-slope mining requirements were reasonable and could be met by surface miners in Virginia (Tr. 1002). Dr. Maneval also testified that a 1976 study by the Library of Congress had concluded that under the Act the costs of reclamation would constitute only about six percent of the price of coal at that time (Tr. 1027-1028).

Dr. Richard Newcomb, an expert in mineral economics, testified that the Act's requirements should not pose serious economic problems for surface miners in Virginia (Tr. 1250) and that the Act is in fact likely to benefit small operators by inducing them to undertake better planning and make decisions based on more complete information (Tr. 1256).

Finally, Billy R. Loughry, a surface mine operator from Pennsylvania, testified that he had successfully used the block cut method on steep slopes in Pennsylvania and had successfully met state requirements virtually identical to the

environmental harm than alternative procedures" (J.S. App. 39a) is but another example of the court's willingness to substitute its own judgment for that of Congress. Reasonable persons might well disagree about the safest or most desirable method for reclaiming surface-mined land, but Congress has determined that restoration to approximate original contour is the general approach that should be followed, and that determination is not irrational.[30] The legislative record contains substantial evidence of the environmental benefits to be derived from regrading mined land to its approximate original contour, and Congress could properly rely on such evidence. See, *e.g.*, CEQ Report, at 18-23, 31-32, 83-84. By reweighing the evidence and concluding that "a return to approximate original contour on steep slopes is environmentally unsound" (J.S. App. 55a-56a n.16), the district court exceeded the judicial province. As the court itself acknowledged (*id.* at 56a n.16), its

---

federal statute's steep-slope mining requirements (Tr. 1788-1790, 1799, 1806-1807).

[30] Indeed, even one of the two studies cited by the district court (J.S. App. 39a n.11) in support of its view that an alternative approach would be preferable concludes that the "block cut" mining method—which is the principal method for satisfying the "approximate original contour" requirement (see note 29, *supra*)—creates a lower potential for environmental harm than other traditional mining methods. See *Erosion and Sediment Control, Surface Mining in Eastern U.S.*, prepared under contract for the Environmental Protection Agency (Oct. 1976), Commonwealth Exh. 9, vol. I, at 13, 80 (Tr. 721). The study found that

> certain mining methods such as the block cut method, mountain top removal, and area mining generally have, from the standpoint of soil loss potential, an advantage over other methods because less land is usually disturbed. It has been demonstrated that, when mining on a steep slope, erosion and sedimentation are directly proportional to the amount of land disturbed.

disagreement with the legislative judgment concerning the probable environmental effects of surface mine reclamation was the decisive factor that "tip[ped] the balance toward finding a taking." The court's invalidation of the "approximate original contour" requirement was thus directly attributable to its improper usurpation of the legislative role. Duly enacted statutory provisions should not be overturned on such grounds.

D. Apart from the district court's error in reweighing the evidence regarding the likely practical consequences of the Surface Mining Act, the court's ruling under the Just Compensation Clause suffers from another serious flaw: it departs substantially from this Court's precedents concerning the showing necessary to establish a taking of private property within the meaning of the Fifth Amendment. The district court held that the reclamation requirements in Section 515(d) take property, because mined steep-slope land restored to its approximate original contour would be worth much less than it would "if it were left leveled or stabilized with benches" (J.S. App. 45a).[31] Similarly, the court held that Section

[31] The court's factual basis for this holding is dubious at best. The court stated that steep-slope land restored to approximate original contour is worth between $5 and $75 per acre, whereas if it were left leveled or stabilized with benches, it would be worth between $5,000 and $300,000 per acre (J.S. App. 37a, 45a). The court's statistics are apparently based on a combination of parts of different witnesses' testimony. Plaintiff Charles Lowry, a local real estate developer, testified (Tr. 843-844) that he owned land on which surface mining was in progress and that he believed the land was worth no more than $75 per acre before mining began and would be worth between $3,000 and $5,000 per acre after mining if it were not restored to its approximate original contour. The figure of $300,000 per acre is apparently derived from the testimony of Michael J. Quilien, vice-president of a surface mining company, who stated as a matter of

522(e)'s prohibitions on surface mining in certain locations take property, because they are "clearly a physical restriction against the removal of coal" (*id.* at 57a). Both of these rulings do not comport with established standards for determining when government regulation rises to the level of a taking.

In the first place, the district court's decision wholly ignores the relevance of the variance procedures in Sections 515(c) and (e) and the waiver provisions in Section 522(e) to the taking question. The entire purpose of Sections 515(c) and (e) is to permit departures from the "approximate original contour" requirement when such exceptions are necessary to achieve "an equal or better economic or public use." Likewise, the waiver provisions in Section 522(e) are intended to permit surface mining, even in otherwise restricted locations, where there is reason to believe that mining operations can be conducted without a significant threat to the environment or to public health and safety.[32] With respect to the "approximate

---

"personal knowledge" that one-half acre of land in Norton, Virginia, which had been surface mined and leveled under the mountaintop removal method, was sold for $150,000 for use as a restaurant site (Tr. 701). However, on cross-examination, Mr. Quillen admitted that mountaintop removal is a permissible surface mining method under the Act and that such a post-mining use would have been approved under the Act as long as the criteria of Section 515(c) had been satisfied (Tr. 754-755).

The court's assertion concerning the enormous value of surface-mined land that is left leveled or stabilized with benches is inconsistent with the extensive evidence at trial showing that the development potential of most surface-mined land in Virginia is limited, unless the land is located near a major highway. See note 22, *supra*.

[32] See also Section 711 of the Act, 30 U.S.C. (Supp. I) 1301, authorizing the Secretary to permit departures, "on an experimental basis" in individual cases, from the environ-

original contour" requirement, the district court also disregarded the fact that, once reclamation is completed, the landowner is free to alter the land's contour in any way that he wishes. The reclamation requirement therefore does not forestall any manner of commercial or residential development.

An error more fundamental than the district court's overlooking of the Act's waiver and variance provisions is its failure to consider systematically the factors identified by this Court as relevant to the question whether regulatory legislation effects a taking of property within the meaning of the Fifth Amendment. Although the Court has candidly acknowledged its inability "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government" (*Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978)), the Court has ordinarily sought to resolve such matters by reference to a number of factors falling into two general categories: "the character of the governmental action" and "[t]he economic impact of the regulation" (*ibid.*).

The character of the governmental action is assessed by looking at the nature of the interference with property. Where an interference can be characterized as a physical invasion by government (see, *e.g.*, *United States* v. *Causby*, 328 U.S. 256 (1946)), or as an acquisition of assets by the government acting in its entrepreneurial capacity, it is more vulnerable to constitutional attack. *Penn Central*, *supra*,

---

mental protection performance standards promulgated under Section 515. The Secretary is authorized to approve such experiments "[i]n order to encourage advances in mining and reclamation practices or to allow post-mining land use for industrial, commercial, residential, or public use (including recreational facilities) * * *."

438 U.S. at 124, 128, 135. On the other hand, a taking should rarely be found where the interference arises "from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124. See *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-596 (1962).

Evaluation of the economic impact of the restriction on property necessarily requires consideration of the "bundle of rights" that together constitute property: "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). See *Goldblatt*, *supra*, 369 U.S. at 592. Mere diminution in the value of property does not effect a taking. *Penn Central*, *supra*, 438 U.S. at 131; *Goldblatt*, *supra*, 369 U.S. at 594; *Hadacheck* v. *Sebastian*, 239 U.S. 394, 408 (1915).

Once it has been established that a regulation serves a substantial public purpose (as the Surface Mining Act indisputably does), the only open question under the Fifth Amendment is whether the regulation prevents all beneficial uses of the property. Neither the reclamation requirement in Section 515(d) nor the surface mining restrictions in Section 522(e) preclude every use of plaintiffs' property. Indeed, the provisions do not preclude coal mining, or even surface coal mining, except in certain narrowly circumscribed locations near roads, schools, churches, parks, public buildings, and cemeteries. In connection with this group of locations, the Act's restrictions are expressly made subject to "valid existing rights" and do not apply to "surface coal mining operations * * * which exist on the [date of enactment]" (30 U.S.C. (Supp. I) 1272(e)). Moreover, the restrictions do not apply to underground mining unless such mining has significant surface effects. Outside the specified areas, the

Act merely imposes performance standards that must be met by mine operators who wish to employ surface mining methods on steep slopes.[33] That is not enough to effect a taking of private property.

Even if the Surface Mining Act were more restrictive, this Court's decisions suggest that a governmental body may prohibit noxious uses of property, without regard to the owner's residual ability *vel non* profitably to exploit the property in other ways. Thus, although Justice Rehnquist, joined by the Chief Justice and Justice Stevens, would have found the Landmarks Preservation Law at issue in *Penn Central* to be a taking, he accepted the unqualified proposition that "the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." 438 U.S. at 144 (Rehnquist, J., dissenting). In support of this statement, Mr. Justice Rehnquist relied on *Mugler* v. *Kansas*, 123 U.S. 623 (1887), in which the Court upheld a state law absolutely prohibiting the operation of a brewery. The Court there explained (*id.* at 668-669):

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legis-

---

[33] Nearly 80% of Virginia's coal can be mined by underground methods. See United States Department of the Interior Federal Coal Management Program, *Final Environmental Statement*, Table 2-2 (1979), relying on a 1977 Bureau of Mines Survey entitled *Demonstrated Coal Reserve Base of the United States as of January 1, 1976*. Accordingly, many steep-slope mine operators can avoid the "approximate original contour" requirement by employing a different mining technique.

> lation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

The approach reflected in *Mugler* has been followed in a long line of decisions in which the Court has sustained governmental regulations designed to prevent noxious uses of property and to protect the public health and safety. *Goldblatt* v. *Town of Hempstead, supra; Miller* v. *Schoene*, 276 U.S. 272 (1928); *Pierce Oil Corp.* v. *City of Hope*, 248 U.S. 498 (1919); *Hadacheck* v. *Sebastian, supra; Reinman* v. *City of Little Rock*, 237 U.S. 171 (1915); see also *Moore* v. *City of East Cleveland*, 431 U.S. 494, 513 (1977) (Stevens, J., concurring) (basic right to use property "has always been limited by the law of nuisance"). It follows from these cases that, in reviewing congressional efforts to protect the environment and the public from the deleterious effects of

surface mining, a court would not even need to consider the remaining beneficial uses to which affected property may be put, except in the context of an inquiry whether the statute enacted was an arbitrarily and unnecessarily harsh means of achieving the legislative purpose.[34]

---

[34] This proposition and the cases cited in the text are not inconsistent with this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), which states the general rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. *Mahon* involved a private injunctive suit by the owners of the surface rights in certain property. Although the plaintiffs had purchased the surface estate subject to the defendant-grantor's reservation of subsurface mining rights, the plaintiffs sought to prevent such mining by invoking a state law that forbade the removal of coal where it would cause the subsidence of a dwelling. The Court invalidated the state law, emphasizing that only a "single private house" would be affected by the proposed mining activity. *Id.* at 413. The Court appeared to be strongly influenced by the fact that the plaintiffs had purchased the property subject to an express reservation of subsurface mining rights and had waived all right to recover damages that might arise from the mining of coal. In these circumstances, the Court was unwilling to permit plaintiffs to rely on a subsequently enacted state law as a means of abrogating their bargain.

The Court's opinion did not disagree in principle with Justice Brandeis' assertions in dissent that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking" and that a "[r]estriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put." 260 U.S. at 417-418. The Court simply was unwilling to apply these general rules, at the instance of private parties hoping to be excused from their bargain, to sustain a state law apparently more concerned with adjusting private legal rights than with protecting any broader public interest.

Here, of course, substantial beneficial uses remain possible. Surface mining is the only activity regulated by the Act, and plaintiffs have shown at most that compliance with the performance standards in Section 515 may somewhat increase the costs of extracting coal on steep slopes. Such increased costs, like other incidental costs resulting from government regulation, are merely expenses of doing business and are not compensable under the Fifth Amendment. See, *e.g.*, *Omnia Co.* v. *United States*, 261 U.S. 502, 509-510 (1923). Similarly, even accepting the district court's "finding" that mined land restored to its approximate original contour is worth less than unreclaimed land, no taking is established. After the completion of mining, land is left in approximately the same condition as before mining began, and in the meantime the owner has gained the benefits to be derived from the extracted coal.[35]

E. Finally, although the provisions of the Surface Mining Act do not on their face take property within the meaning of the Fifth Amendment, there remains at least the theoretical possibility that as applied to particular parcels of land, the Act and the Secretary's regulations would effect a taking. That situation is not presented here. Even if it were, however, the statute would not necessarily be unconstitutional. The Fifth Amendment does not prohibit the taking of private property by the federal government for a public use; it requires only that, if private property is

---

[35] Three other federal district courts have rejected arguments that various provisions of the Surface Mining Act effect unconstitutional takings of property. See the *Star Coal*, *Holmes Limestone*, and *Concerned Citizens of Appalachia* cases, all cited in note 23, *supra*. The district court in *Indiana* v. *Andrus*, also cited in note 23, *supra*, is the only other federal court to sustain a Just Compensation Clause challenge to any of the Act's regulatory measures.

taken for such a purpose, "just compensation" must be paid.

The Tucker Act, 28 U.S.C. 1491, is a general jurisdictional grant to the Court of Claims "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, * * * or for liquidated or unliquidated damages in cases not sounding in tort." Nothing in the language or the legislative history of the Surface Mining Act evidences a specific congressional intent to make Tucker Act suits unavailable to persons aggrieved by the regulation of surface mining. To be sure, the Tucker Act has never been used as a basis for recovering compensation for property "taken" through the operation of a regulatory measure enacted by Congress. One may doubt whether the jurisdictional grant in the Tucker Act was ever intended to cover taking claims arising from regulatory legislation, wherein, by hypothesis, Congress has decided to define property rights rather than to acquire them.[36] See *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1010 (Ct. Cl. 1967). See also *Mosca* v. *United States*, 417 F.2d 1382, 1386 (Ct. Cl. 1969). Be that as it may, however, a judicial declaration that a federal statute is unconstitutional and an injunction against its enforcement are serious matters, and such equitable relief ordinarily should not be granted until plaintiffs have established that their legal remedies are inadequate. If compensation is available under the Tucker Act, then whatever takings may be effected by the Surface Mining Act with respect to

---

[36] The legislative history of the Surface Mining Act indicates that Congress included the "valid existing rights" exception in Section 522(e) to avoid any potential problems under the Just Compensation Clause of the Fifth Amendment. See 123 Cong. Rec. 12878 (1977) (remarks of Rep. Roncalio and Rep. Udall).

particular properties do not violate the Fifth Amendment. See, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, supra,* 438 U.S. at 94 n.39; *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 126-127 (1974); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949).

Accordingly, if in the future any of the plaintiffs in the present case or any other surface coal mine operators believe that the Secretary's application of the Surface Mining Act (including its waiver and variance provisions) to specific parcels of land effects a taking of property, they may seek compensation under the Tucker Act before pursuing their equitable remedies in federal district court. If the Court of Claims determines that a taking has occurred (or if it pretermits the taking question) and then decides that the Tucker Act jurisdiction does not extend to claims for compensation arising from regulatory legislation (as opposed to claims arising from physical invasions of property or exercises of the eminent domain power), then an action in district court for declaratory and injunctive relief will be appropriate.

IV

THE ENFORCEMENT PROVISIONS OF THE SURFACE MINING ACT AUTHORIZING THE ISSUANCE OF SUMMARY CESSATION ORDERS AND THE IMPOSITION OF CIVIL PENALTIES DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. Section 521(a)(2) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1271(a)(2), directs the Secretary immediately to order cessation of a surface mining operation whenever he determines, on the basis of a federal inspection, that the operation is in violation of the Act or a permit condition required by the Act and that it

> creates an imminent danger to the health or safety of the public, or is causing, or can reason-

> ably be expected to cause significant, imminent environmental harm to land, air, or water resources * * *.[37]

A mine operator aggrieved by a summary cessation order issued under Section 521(a)(2) or by a cessation order issued after a notice of violation and expiration of an abatement period under Section 521(a)(3) may immediately seek temporary relief from the Secretary, and the Secretary must act on such a request within five days of its receipt. Section 525(c), 30 U.S.C. (Supp. I) 1275(c). If the Secretary denies temporary relief, that action is subject to judicial review under Section 526(c) of the Act, 30 U.S.C. (Supp. I) 1276(c). In addition, cessation orders are subject to informal administrative review under Section 521(a)(5) and formal administrative review, including an adjudicatory hearing, under Section 525(b).[38] The Secretary's decision in the formal review proceeding is subject to judicial review under Section 526(a)(2).

The district court held (J.S. App. 65a-66a, 73a) that the issuance of summary cessation orders under Section 521(a)(2) violates the Due Process Clause, because the statute does not provide sufficiently ob-

---

[37] In situations where the Secretary determines that a violation of the Act or of a permit condition does not entail such a serious threat, Section 521(a)(3) directs him to issue a notice of violation fixing a reasonable time for abatement. If, at the expiration of that period, the violation has not been abated, Section 521(a)(3) directs the Secretary immediately to order cessation of the offending mining operation or the offending portion thereof.

[38] Section 521(a)(5) of the Act provides that any cessation order shall automatically expire within 30 days, "unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of public hearing."

jective criteria for summary administrative action. In addition, the court ruled that due process requires the Secretary to respond within 24 hours to a mine operator's request for temporary relief from a summary cessation order and that the five-day period prescribed by Section 525(c) is unconstitutional (*id.* at 73a).

The district court's decision was both premature and incorrect. Plaintiffs did not allege that they, or any one of them, received a summary cessation order under Section 521(a)(2) or suffered loss as a result. Nor was any such showing of harm made at trial. Accordingly, plaintiffs have not been injured by the cessation order procedure, and the district court should not have considered their objections to it. The adequacy of enforcement devices established by Congress should not be determined in the absence of a concrete case or controversy. The question of what process is due in a given situation depends in large measure on the particular circumstances involved. For example, the propriety of a summary cessation order will inevitably vary with the gravity of the threat posed by particular surface mining practices and conditions. Without some allegation and showing that the parties challenging the Act's provisions have actually suffered injury attributable to those provisions, a reviewing court should not disturb the enforcement scheme designed by Congress. In any event, the provisions invalidated by the district court are not constitutionally defective.

The issuance of immediate cessation orders authorized by Section 521(a)(2) fits comfortably within the lengthy line of precedents holding that due process does not always require a prior hearing. This Court has frequently recognized that, in extraordinary and emergency situations, summary administrative action may be justified. See, *e.g.*, *Calero-Toledo* v. *Pearson*

Yacht Leasing Co., 416 U.S. 663, 677-680 (1974); *Boddie* v. *Connecticut*, 401 U.S. 371, 378-379 (1971); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950); *Fahey* v. *Mallonee*, 332 U.S. 245, 253-254 (1947); *Yakus* v. *United States*, 321 U.S. 414, 442-443 (1944), and cases there cited; *Bowles* v. *Willingham*, 321 U.S. 503, 519-521 (1944); *Phillips* v. *Commissioner*, 283 U.S. 589, 595-599 (1931); *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306, 315-321 (1908); *Lawton* v. *Steele*, 152 U.S. 133, 140-142 (1894). See also *Mackey* v. *Montrym*, 443 U.S. 1, 17 (1979), and *id.* at 21 n.1 (Stewart, J., dissenting).

The district court cited no authority for its holding that Section 521(a)(2) does not provide sufficiently objective criteria for the issuance of cessation orders without a prior hearing. The decision appears to have been based on a conviction that some mine operators have sustained economic harm as the result of summary cessation orders subsequently overturned on administrative appeal. But the possibility of administrative error inheres in any regulatory system; statutory programs authorizing emergency administrative action prior to a hearing are no exception. As this Court explained in *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, 339 U.S. at 599:

> Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

The relevant inquiry is not whether a summary cessation order should have been issued in a particular case but whether the statutory procedure itself is

incapable of affording due process. *Yakus* v. *United States*, *supra*, 321 U.S. at 434-435.

Congress was acutely aware of the devastating damage that mining disasters may cause,[39] and it designed the summary cessation order procedure to strike a reasonable balance between the legitimate desire of mining companies to be heard before submitting to administrative regulation and the overriding governmental interest in protecting the public and the environment from dangerous conditions. The standards for issuance of immediate cessation orders under Section 521(a)(2)[40] are quite similar to the

---

[39] The legislative history of Section 521(a)(2) of the Surface Mining Act shows that Congress regarded the Secretary's power to issue immediate cessation orders as "critical" and that the measure was primarily intended to avert the possible occurrence of such disasters as the "Buffalo Creek flood." H.R. Rep. No. 95-218, *supra*, at 129-130. The Buffalo Creek flood resulted from the sudden collapse of a coal mine waste impoundment dam in 1972 near Buffalo Creek, West Virginia. The flood killed 124 persons and left 4,000 persons homeless. See H.R. Rep. No. 94-1445, 94th Cong., 2d Sess. 19 (1976).

[40] Section 701(8) of the Act, 30 U.S.C. (Supp. I) 1291(8), defines "imminent danger to the health and safety of the public" as follows:

> the existence of any condition or practice, or any violation of a permit or other requirement of this chapter in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

See also 30 C.F.R. 701.5, 44 Fed. Reg. 15319, 15320 (1979) (permanent regulation defining both "imminent danger" to

criteria provided by Congress in other instances where statutory provisions allowing summary administrative action have been upheld against due process challenges. See, *e.g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, 339 U.S. at 595 ("dangerous to health * * * or would be in a material respect misleading to the injury or damage of the purchaser or consumer"); *Fahey* v. *Mallonee*, *supra*, 332 U.S. at 250-251 n.1 ("is unsafe or unfit to manage a Federal savings and loan association" or "[i]s in imminent danger of becoming impaired"); *Air East, Inc.* v. *National Transportation Safety Board*, 512 F.2d 1227, 1232 (3d Cir.), cert. denied, 423 U.S. 863 (1975) ("emergency requiring immediate action * * * in respect to air safety in commerce").

Perhaps most pertinent to the present case is *Sink* v. *Morton*, 529 F.2d 601 (4th Cir. 1975), which rejected a mine operator's due process attack on the constitutionality of summary enforcement provisions in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 814.[41] Section 814(c) of the Mine Safety Act permitted a federal inspector to order the immediate withdrawal of all persons from a mine at which he found two or more unwarranted violations of mandatory health or safety standards, at least one of which "could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *." The inspector was not required to find that a violation could cause "imminent dan-

---

the public health and safety and "significant, imminent environmental harm").

[41] The Act was substantially amended by the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290. See 30 U.S.C. (Supp. I) 814.

ger." [42] The court of appeals held that the issuance of withdrawal orders without a prior hearing did not violate the Due Process Clause. The district court in the present case ignored the Fourth Circuit's decision in *Sink*, despite the Secretary's express reliance on that precedent.[43]

By requiring more "objective" standards for the issuance of summary cessation orders, the district court improperly substituted its personal views for the considered congressional judgment that "inspectors are in the best position to recognize and control compliance problems." S. Rep. No. 95-128, *supra*, at 90. See *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, 339 U.S. at 600. As the Senate Committee emphasized (*id.* at 91), individual on-site determinations are indispensable because "neither the Congress nor any

---

[42] Section 814(c) has been redesignated as Section 814(d). 30 U.S.C. (Supp. I) 814(d).

Section 814(a), as enacted in 1969, provided for the summary issuance of an order requiring the immediate withdrawal of all persons from a coal mine in which a federal inspector found an "imminent danger." As amended by the Federal Mine Safety and Health Act of 1977, Section 814(a) no longer provides for "imminent danger" withdrawals. 30 U.S.C. (Supp. I) 814(a). That authority is now contained in Section 817(a). The subsection was not at issue in *Sink*.

[43] The district court also explicitly rejected the holding in *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1319-1322 (D. D.C. 1978), aff'd in part, rev'd in part on other grounds, 627 F.2d 1346 (D.C. Cir. 1980), sustaining Section 521(a)(2) of the Surface Mining Act and the Secretary's implementing regulation against a due process challenge identical to that involved here. See also *Star Coal Co.* v. *Andrus*, Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980), slip op. 17-18 (upholding Section 521(a)(2) against due process attack), appeal pending on other grounds, No. 80-49; *Anderson & Anderson Contractors, Inc.* v. *Latimer*, 257 S.E. 2d 878 (W. Va. 1979) (upholding a similar provision in the West Virginia statute regulating surface coal mining).

regulatory authority can totally predict the public and environmental hazards arising from such a complex endeavor as surface coal mining * * *." If the approach adopted by the district court were followed, Congress would be faced with the impossible task of describing in detailed (and perhaps quantifiable) terms every conceivable situation in which an imminent threat to the public health or safety or to the environment might arise. The Due Process Clause imposes no such requirement. See *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

The district court's reduction of the statutorily-prescribed time period for the Secretary's response to requests for temporary relief is likewise an unsupportable substitution of a judicial policy preference for that of Congress. Plaintiffs did not demonstrate that the five-day reply period affected them adversely in a particular case or is generally unreasonable. Nor did they introduce evidence tending to show that a shorter reply period is administratively feasible. The district court record simply provides no basis for the conclusion that the five-day reply period allowed by Section 525(c) offends the requirements of due process.

B. As they did with the summary cessation order provisions in Section 521(a)(2) of the Act, plaintiffs challenged the civil penalty provisions in Section 518 without any allegation or showing that they had been affected or harmed by the statutory procedures for the assessment and collection of penalties. For the reasons already stated (see page 62, *supra*), therefore, this aspect of their due process attack was also premature.

Furthermore, the district court's ruling that the Act's civil penalty provisions violate the Due Process Clause because civil penalties will be assessed by the Secretary prior to a hearing (J.S. App. 68a, 74a) appears to be based on a misunderstanding of the

statute. No penalties are finally imposed under Section 518 until the alleged offender has been provided an opportunity for a hearing. Section 518(b) leaves no room for doubt on this point: "A civil penalty shall be assessed by the Secretary only after the person charged with a violation * * * has been given an opportunity for a public hearing."

Although final assessment of a civil penalty cannot occur until an opportunity for a hearing has been provided, Section 518(c) directs the Secretary, within 30 days of a notice of violation or a cessation order, to inform the mine operator of the proposed amount of the civil penalty to be assessed. Section 518(c) further requires that, if the operator "wishes to contest either the amount of the penalty or the fact of the violation," he must "forward the proposed amount to the Secretary for placement in an escrow account." If, after administrative or judicial review, it is determined that no violation occurred or that the proposed penalty should be reduced, the appropriate amount is promptly returned to the operator with interest.

Moreover, under the regulations promulgated by the Secretary (43 C.F.R. 4.1100 *et seq.*), the statutory scheme is even less burdensome on mine operators than the unexplicated language of Section 518 might suggest. The Secretary has construed the Act to include two separate authorizations for administrative review: one for civil penalties in Section 518 and one for notices of violation and cessation orders in Section 525. Although Section 518(c) may seem to require payment of proposed penalties into escrow as a condition of any administrative review of the alleged violation on which the proposed assessment is based, the Secretary has construed and applied the Act to permit a hearing on the fact of the violation under Section 525, without regard to Section 518's prepay-

ment requirement.[44] The review available under Section 518 differs from that available under Section 525 only in that hearings requested under the latter provision may not concern the *amount* of the proposed penalty assessment.[45] Accordingly, if a mine operator wishes to contest the amount of a proposed penalty as well as the fact of the underlying violation, it must seek review under Section 518, and prepayment of the penalty into an escrow account is a precondition of that review. In addition, however, under the Secretary's regulations, even the amount of the penalty may be reviewed and altered on the basis of an informal conference that must be held at the mine operator's request before any payment into an escrow account is required. See 30 C.F.R. 723.17, 42 Fed. Reg. 62703-62704 (1977).

The district court appears to have confused the actual assessment of a civil penalty, *i.e.*, the entry of a final administrative order, with the Secretary's initial notice to the operator of the amount of the proposed

---

[44] The correctness of the Secretary's construction and application of Sections 518 and 525 is not at issue in this litigation, because plaintiffs can only benefit from the interpretation adopted by the Secretary.

[45] A procedural difference between the two forms of administrative review is that Section 525 review ordinarily must be requested earlier. Review under Section 525 must be requested within 30 days of the issuance of the notice of violation or cessation order being challenged. 30 U.S.C. (Supp. I) 1275(a). On the other hand, Section 518 allows the Secretary 30 days after the issuance of a notice of violation or cessation order in which to issue a proposed penalty assessment based on that notice or order. After the issuance of the proposed penalty assessment, the mine operator has 30 additional days in which to seek review under Section 518. If timely applications for administrative review are made under both Section 518 and Section 525, the Secretary normally consolidates the administrative hearings into one proceeding.

penalty. See J.S. App. 67a-68a & n.20. In fact, the operator invariably has an opportunity to be heard, even before the temporary deprivation involved in payment of a proposed penalty.

Especially as applied by the Secretary in conjunction with the administrative review provisions in Section 525, the civil penalty provisions in Section 518 do not violate due process. Even if Section 518 were construed to require proposed penalties to be placed in escrow before a mine operator could obtain any hearing at all on the fact of violation or the amount of the penalty, it would not deny plaintiffs due process of law. The Senate Committee Report explains that the prepayment requirement was included in Section 518(c) in order to "avoid the problem of non-collection of fines." S. Rep. No. 95-128, *supra*, at 59. The provision is a reasonable solution designed to eliminate the difficulty identified by Congress without imposing significant burdens on mine operators. In the absence of some particularized showing that the statute creates unfair hardship in a given set of circumstances, there is no reason to believe that a mine operator will be harmed by the statutory procedure. The "refund-with-interest" provision in Section 518(c) ensures that operators who prevail on administrative or judicial review will suffer no financial injury.

As Mr. Justice White wrote in *Arnett* v. *Kennedy*, 416 U.S. 134, 187 (1974) (concurring and dissenting opinion), "[i]n passing upon claims to a hearing before preliminary but nonfinal deprivations, the usual rule of this Court has been that a full hearing at some time suffices." See *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*; *Phillips* v. *Commissioner*, *supra*; *North American Cold Storage Co.* v. *City of Chicago*, *supra*; *Scottish Union and National Insurance Co.* v. *Bowland*, 196 U.S. 611, 631-632 (1905); *Springer* v.

United States, 102 U.S. 586, 593-594 (1881); *Sink* v. *Morton*, *supra*, 529 F.2d at 604 ("Due process does not command that the right to a hearing be held at any particular point during the administrative proceedings; it is satisfied if that right is given at some point during those proceedings").[46] The civil penalty provisions of the Surface Mining Act therefore do not violate the Due Process Clause.

CONCLUSION

To the extent the judgment of the district court rejects plaintiffs' Commerce Clause challenge to Title V of the Surface Mining Act, it should be affirmed. In all other respects now before the Court, the judgment should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SANFORD SAGALKIN
Acting Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MICHAEL A. MCCORD
Attorneys

NOVEMBER 1980

---

[46] But see *Star Coal Co.* v. *Andrus*, *supra*, slip op. 18-19 (concluding that there is a substantial likelihood that the escrow requirement in Section 518(c) violates due process). The district court in *Indiana* v. *Andrus*, cited in note 23, *supra*, also held that Section 518 violates the Due Process Clause. Like the district court's decision here, the *Indiana* decision suffers from a lack of appreciation of the way in which the Secretary administers the Act as a whole and from legal errors regarding the requisite timing of an administrative hearing under the Due Process Clause.

APPENDIX

The Surface Mining Act was passed and signed into law only after the most thorough legislative consideration. A brief summary of the legislative history of the Act may be found in Note, 81 W. Va. L. Rev. 775 (1979). The legislative history is also summarized in S. Rep. No. 95-128, 95th Cong., 1st Sess. 59-61 (1977), and in H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 140-141 (1977).

Earlier versions of the Act were passed by Congress in December 1974 and in May 1975. On both occasions, President Ford vetoed the proposed legislation. The first veto was a pocket veto at the close of the 93d Congress. The second veto, shortly after the beginning of the 94th Congress, was sustained by a margin of three votes in the House of Representatives, after heated debate. The vote was 278-143. 121 Cong. Rec. 17982-18008 (1975). Three months earlier, the Senate had passed its version of the bill by a vote of 84-13. *Id.* at 6202. The Senate also agreed to the conference report by an overwhelming majority (*id.* at 12965). It therefore seems likely that the narrow failure to obtain a two-thirds vote to override in the House was the only factor that prevented the Surface Mining Act from becoming law two years sooner than it did. (The version of the Act passed by the 94th Congress differed in several respects from the bill that ultimately became law. See S. Rep. No. 95-128, *supra*, at 60).

Hearings on proposed legislation that led ultimately to the Surface Mining Act began in 1968. *Surface Mining Reclamation: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. (1968). Three years later, additional hearings were held in both the House and the Senate.

Regulation of Strip Mining: Hearings Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971); *Surface Mining: Hearings Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. (1971). The Committees reported bills for consideration by their respective houses, and the House of Representatives passed H.R. 6482 by a vote of 265-75. H.R. Rep. No. 92-1462, 92d Cong., 2d Sess. (1972); S. Rep. No. 92-1162, 92d Cong., 2d Sess. (1972); 118 Cong. Rec. 35031, 35055-35056 (1972). Congress adjourned before the Senate could act on the measure.

Similar bills were reintroduced in the 93d Congress, and further hearings were held. *Regulation of Surface Mining Operations: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. (1973); *Regulation of Surface Mining: Hearings Before the Subcomm. on the Environment and the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. (1973). At the request of Senator Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, the Council on Environmental Quality prepared a report entitled *Coal Surface Mining and Reclamation: An Environmental and Economic Assessment of Alternatives* (Comm. Print 1973), and the Senate Committee held additional hearings to consider the report and the reactions it provoked. *Coal Surface Mining and Reclamation: Hearing Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. (1973).

Again, the House and Senate Committees reported bills for consideration by the full House and Senate.

S. Rep. No. 93-402, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93-1072, 93d Cong., 2d Sess. (1974). The Senate passed S.425 by a vote of 82-8 (119 Cong. Rec. 33333 (1973)), and several months later, the House passed an amended version of the bill, H.R. 11500, by a vote of 291-81 (120 Cong. Rec. 25272-25273, 25294 (1974)). After more than 100 hours of deliberations, the Conference Committee produced its report (H.R. Conf. Rep. No. 93-1522, 93d Cong., 2d Sess. (1974)), and both houses agreed in December 1974. The bill failed to be enacted only because of President Ford's pocket veto.

The process began again with the opening of the 94th Congress in 1975. The surface mining legislation was reintroduced, and in February the Senate Committee held a hearing to permit Administration spokesmen to state the Executive Branch's objections to the bill. *Surface Mining Briefing: Briefing Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975). Both Committees soon reported their bills to the full House and Senate, which again passed the proposed legislation by large majorities. S. Rep. No. 94-28, 94th Cong., 1st Sess. (1975); H.R. Rep. No. 94-45, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. 6202, 7069, 7803 (1975). The conference report was accepted by both houses in May, and this led to President Ford's second veto and the unsuccessful override effort described above. See H.R. Conf. Rep. No. 94-189, 94th Cong., 1st Sess. (1975). Later in the 94th Congress, the House Committee reported two additional pieces of proposed surface mining legislation, but no further action was taken by the full House or Senate until the change of administration. See H.R. Rep. No. 94-896, 94th Cong., 2d Sess. (1976); H.R. Rep. No. 94-1445, 94th Cong., 2d Sess. (1976).

The protracted congressional endeavor finally bore fruit in 1977. The relevant House and Senate Committees held extensive hearings shortly after the opening of the 95th Congress to consider bills introduced at the very beginning of the new legislative session. *Surface Mining Control and Reclamation Act of 1977: Hearings Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess. (1977); *Surface Mining Control and Reclamation Act of 1977: Hearings Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. (1977). The Committees expeditiously reported the legislation to the full houses, and passage in both chambers followed soon afterward. H.R. Rep. No. 95-218, 95th Cong., 1st Sess. (1977); S. Rep. No. 95-128, 95th Cong., 1st Sess. (1977); 123 Cong. Rec. 12887, 15778 (1977). The vote in the House was 241-64 and in the Senate, 58-8. Lengthy floor debate preceded the vote in both houses. *Id.* at 12861-12886, 15691-15754, 15762-15777. The Conference Committee issued its report in July (H.R. Conf. Rep. No. 95-493, 95th Cong., 1st Sess. (1977)), and after further floor debate, both houses agreed to the report, the House by a vote of 325-68, the Senate by a vote of 85-8. 123 Cong. Rec. 23967-23988, 24419-24429 (1977). President Carter signed the Act into law on August 3, 1977.

★ U. S. GOVERNMENT PRINTING OFFICE: 1980 333464 161